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Kevin T. Jackson

*Fordham University*, [kjackson@fordham.edu](mailto:kjackson@fordham.edu)

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# RETHINKING ECONOMIC GOVERNANCE: A NATURALISTIC COSMOPOLITAN JURISPRUDENCE

KEVIN T. JACKSON\*

**Abstract:** This Article seeks to develop a frame of reference for comprehending legitimacy structures in emerging global economic governance regimes. To that end, it provides, in contradistinction from positivist and pragmatist approaches, an alternative normative justificatory framework for soft law. As its very name suggests, soft law is a law-like phenomenon, distinct from classical notions of law, yet no less significant, and hence worthy of receiving systematic moral analysis. It is therefore reasonable to draw upon philosophy of law as an intellectual resource for undertaking such a conceptual endeavor. Accordingly, this Article examines philosophical justifications for evolving soft law syndicates that profess to impose obligations on business enterprises and other participants dealing with human rights and sustainability matters. The Article concludes that a naturalistic cosmopolitan jurisprudence that embraces the intrinsic value of rule of law and human rights provides a vital intellectual pathway for surmounting legitimacy gaps in global economic governance.

## INTRODUCTION

The global activities of business, governments, nongovernmental organizations (NGOs), intergovernmental organizations (IGOs), and civil society are becoming increasingly interlaced.<sup>1</sup> Growing global interconnectivity is bringing about a head-on confrontation with traditional territorially-based principles for contemporary economic governance associated with the Westphalian state system.<sup>2</sup> Perhaps the most significant defiance of the territorial principle results from the

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\* Professor of Law and Ethics at the Graduate School of Business, Fordham University. Daniel Janssen Chair, Université libre de Bruxelles, Brussels, Belgium. The author is grateful for the generous assistance of John James Liolos, Executive Articles Editor, and the editorial staff of the *Boston College International & Comparative Law Review*.

<sup>1</sup> See David Held & Anthony McGrew, *The Great Globalization Debate: An Introduction*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 1, 11 (David Held & Anthony McGrew eds., 2000).

<sup>2</sup> See *id.* at 7–8.

mounting number of global issues involving sustainability and human rights.<sup>3</sup>

The emerging global economic governance regime is characterized by a transition away from a state-centered system toward a multiple-actor system.<sup>4</sup> Attending this transition is a fragmentation of authority and a blurring of lines that once delineated the public and private realms.<sup>5</sup> Increasingly, private actors are operating in authoritative positions, fulfilling governing functions once perceived to be the exclusive domain of governments.<sup>6</sup>

If the boundaries separating the private and public sectors are shifting with respect to the concept of authority, logic suggests that they must do so with respect to responsibility as well. Consequently, private actors—particularly business enterprises—are increasingly called upon to share magnified public responsibilities<sup>7</sup> for which they are held accountable in large part through their reputations.

Meanwhile, significant cultural and ethical diversity exists within the ever-tightening world community, posing problems for understanding cross-cultural standards for economic participants. For example, human rights and soft law civil regulations centered upon corporate social responsibility and sustainability are often portrayed as standing alongside hard international law standards in terms of their global reach and universal validity.<sup>8</sup> The peculiar international responsibilities incorporated into global economic governance regimes represent a fertile ground for philosophical analysis that is sensitive to both the moral imperatives of the standards issuing from such regimes, and the practical realities facing contemporary business enterprises, nation-states, and other participants in the world economic order.

The nature of contemporary global governance regimes raises a number of questions. Are the governance regimes authentic legal orders, and if so, in what sense? If they are not genuine legal orders, do they nevertheless have legitimacy, and on what basis are such determi-

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<sup>3</sup> Cf. Vinay Bhargava, *Introduction to Global Issues*, in *GLOBAL ISSUES FOR GLOBAL CITIZENS: AN INTRODUCTION TO KEY DEVELOPMENT CHALLENGES* 1, 2–3 (Vinay Bhargava ed., 2006) (describing environmental and human rights issues as two of the main categories of global issues faced today).

<sup>4</sup> See Held & McGrew, *supra* note 1, at 11–12.

<sup>5</sup> See Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights*, 19 *BUS. ETHICS Q.* 349, 354 (2009).

<sup>6</sup> See *id.* (describing how the United Nations stopped relying on governmental support for HIV/AIDS prevention because private companies had greater resources).

<sup>7</sup> See *id.* at 350.

<sup>8</sup> See *id.* at 361–63.

nations made? Are the obligations imposed by the regime merely discretionary and voluntary, or is there some deeper sense in which they are mandatory and non-voluntary?

These questions are jurisprudential in the sense that, from a rule of law perspective, global economic governance should be committed to aligning economic power with justice.<sup>9</sup> Law seeks to tame power—whether that power arises from politics or from business—and convert it into authority through legitimizing principles such as democracy, separation of powers, human rights, and pursuit of the common good.<sup>10</sup> The rule of law thereby serves to mediate relations between the rich and poor, the weak and powerful, and the majority and minorities.<sup>11</sup> Moreover, the rule of law acts as a constraint on capricious behavior, and sets limits on the otherwise arbitrary exercise of power.<sup>12</sup> Accordingly, the wider the gap between power and authority in global governance, the greater the international legitimacy deficit becomes.<sup>13</sup>

It is in light of such questions that this Article confronts the problem of constructing an adequate frame of reference from which to understand emerging global economic governance regimes. It aims to provide an alternative normative justificatory foundation for soft law. Because soft law is, as its name implies, at least a law-like phenomenon, it makes sense to turn to philosophy of law as an intellectual resource for such a conceptual project.<sup>14</sup> This Article analyzes philosophical justifications for emerging soft law syndicates that purport to establish obligations for business enterprises and other participants toward civil regulations touching upon sustainability and human rights responsibilities.

The dominant jurisprudential paradigms for law justification and interpretation are legal positivism, legal pragmatism (critical legal studies and law and economics approaches), and legal naturalism (law-as-

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<sup>9</sup> Cf. Peter Muchlinski, *Implementing the New Corporate Human Rights Framework*, 22 BUS. ETHICS Q. 145, 155 (2012) (arguing for a relationship between corporate responsibility and human rights).

<sup>10</sup> See BRIAN Z. TAMANAHA, ON THE RULE OF LAW 32–36 (2004).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> Cf. *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL. (Apr. 29, 2010), <http://plato.stanford.edu/entries/legitimacy/> (“Some associate legitimacy with the justification of coercive power and with the creation of political authority. Others associate it with the justification, or at least the sanctioning, of existing political authority.”).

<sup>14</sup> See Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 506 (2004).

integrity and natural law theories).<sup>15</sup> After a background characterization of emergent global governance regimes is provided in Part I, these paradigms are exposed with an eye to evaluating their respective adequacy in offering justifications for such regimes and the standards issuing from them. Part II identifies the following deficiencies of the paradigms presented. First, despite its strong attraction as a model of national legal orders, positivism fails to align descriptive portrayal and normative justification as applied to global economic governance. Especially given that global economic governance goes to the heart of moral concerns surrounding sustainability and human rights matters, there is a demand for scholarship to recommend how governance schemes *should* be designed, and how participants in such regimes *ought* to act. Positivist viewpoints fail to bear in mind that even a limitless supply of factual data is insufficient to provide an “ought.”<sup>16</sup> Second, pragmatism, taking the forms of critical legal studies and law and economics, centers on dishing up narrow instrumental justifications of law, yet does so to the neglect of nourishing the sort of broader non-instrumental justification that is demanded for standards with global reach and universal legitimacy.<sup>17</sup> In the international context, pragmatist influence can be seen when the duty to comply with legal norms is treated in an instrumental and consequentialist way, such that discretionary policy decisions by states and other global agents replace the rule of law.<sup>18</sup> Law-as-integrity (one of the most respected contemporary

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<sup>15</sup> See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710, 716 (1991) (outlining several schools of legal thought invoked in the development of public law scholarship).

<sup>16</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 393–94 (1945) (“[W]e must avoid the oft-repeated mistake of identifying the category of the ‘ought’ with the idea of the ‘good,’ ‘right,’ or ‘just’ in a material sense, if we wish to comprehend natural and positive law as normative and yet to maintain the distinction between them.”).

<sup>17</sup> Cf. *id.* at 349 (classifying matters that cannot be regulated by national law as norms of international law by necessity); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of “Law and Economics,”* 35 J. LEGAL EDUC. 274, 274–76 (1984) (noting that law and economics practitioners approach each analysis individually rather than broadly); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 535 (“Critical theorists often adopt the language and methods of pragmatism . . .”).

<sup>18</sup> An example of discretionism occurring in place of binding commitment to rule of law is evident in memoranda written in support of the Bush administration’s decision to side-step constraints imposed by the Geneva Convention with regard to interrogation of detainees. The justification was framed in instrumentalist language: “Think about what you want to do when you have captured people from the Taliban and Al Qaeda. You want to interrogate them . . . . [I]t seems to me that if something is necessary for self-defense, it’s permissible to deviate from the principles of Geneva.” *Interview: John Yoo*, FRONTLINE (Oct. 18, 2005), <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>; Jor-

versions of legal naturalism), while avoiding the descriptive and instrumental deficiencies of positivism and pragmatism respectively, nevertheless misrepresents the concept of law as encompassing only the restraint and legitimation of state coercion, particularly in the context of domestic legal orders.<sup>19</sup> Yet emerging transnational soft law syndicates increasingly fall outside of state-based and coercion-centered regimes, and are addressed to international, not domestic agents.<sup>20</sup>

Building on this discussion, Part III provides an alternative naturalistic paradigm for global economic governance grounded in a non-instrumental regulative conception of rule of law and human rights. Stemming from philosophical roots in natural law theory, this paradigm situates the legitimation of global economic governance regimes in relation to three interconnected macro-juridic ideals: first, that of international rule of law, distilled from mainstream accounts of rule of law chiefly formulated in connection with domestic legal systems, yet here abstracted to the global context; second, the concept of human rights as a form of higher, unwritten law; and third, the idea of the global common good. The Article concludes that rather than seeking to institute a centralized and coercive world-wide legal administration proceeding from an instrumental conception of law and deferring to the discretion and arbitrariness of power-driven state authorities, global economic governance should foster respect for the normative and intrinsically obligatory nature of decentralized norms, congruent with rule of law and human rights, and held in orbit around the global common good.

#### I. BACKGROUND OF EMERGING REGIMES FOR SUSTAINABILITY AND HUMAN RIGHTS

Numerous trends are taking place today, demanding that some account be given of the legitimacy of global economic governance schemes and, at the same time, calling into question traditional ways of thinking about the responsibilities of economic actors on the world

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dan Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 356.

<sup>19</sup> See *infra* text accompanying notes 303–311.

<sup>20</sup> See, e.g., Alessandro Bonanno, *Globalization, Transnational Corporations, the State and Democracy*, 12 INT'L J. SOC'Y AGRIC. & FOOD 37, 37 n.3 (2004) (highlighting that transnational organizations often fall outside state control and that international institutions often address these issues).

stage. First, the traditional role of “hard” public international law<sup>21</sup> is met by the emergence of informal regulatory regimes and civil society arrangements.<sup>22</sup> As the private sector is taking on more of a public character, private authorities are coming to occupy a more auspicious place in transnational economic regulation.<sup>23</sup>

Second, in a departure from public international law’s traditional primary concern with matters of procedural justice in political and economic affairs, the emergence of global governance regimes, which are aimed at engaging nongovernmental actors in the creation of public value,<sup>24</sup> is ushering in some new pathways for bringing pressing issues of sustainability, corporate social responsibility, human rights, and matters of structural justice to bear on international economic affairs.<sup>25</sup>

As the recent global financial crisis, mounting concerns over global climate change, and similar trepidations over world poverty demonstrate, a variety of economic participants may act without any intention to do harm; indeed, they may not even be doing anything wrong in terms of conventional understandings, yet they may generate profound and sustained structural harms by carrying out ordinary behaviors.<sup>26</sup> Structural injustice constitutes a type of wrongdoing separate and distinct from the misconduct of any individual actor or from the purposefully repressive policies or conduct of a single government.<sup>27</sup> Structural injustice comes about as a result of a multiplicity of actors fulfilling their respective functions and pursuing their interests and objectives within accepted norms and established institutional rules.<sup>28</sup>

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<sup>21</sup> See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE 21, 31–37 (Dinah Shelton ed., 2000). Hard law refers to laws that are in some way binding. See *id.* In the context of international law, hard law refers to self-executing treaties or international agreements, along with customary laws. Cf. *id.* at 38–40 (stating that the content and intention of international agreements and practices is what makes those agreements and practices binding). Such instruments give rise to legally enforceable commitments on the part of nation-states and other subjects of international law. See *id.*

<sup>22</sup> See Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

<sup>23</sup> See *id.* at 9–13.

<sup>24</sup> John Donahue, *On Collaborative Governance* 1 (John F. Kennedy Sch. of Gov’t Corporate Soc. Responsibility Initiative, Working Paper No. 2, 2004).

<sup>25</sup> Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, Soc. PHIL. & POL’Y, Jan. 2006, at 102, 114.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Hence, structural injustice places special demands on the problem-solving capabilities of states, contributing to the “governance gap.”<sup>29</sup> The origins of the problems are complex and obscure, and extend past the reach of any given state. This returns to the idea mentioned above regarding the repudiation of the territorial principle, in line with the insight that it is a feature of global issues that they are solvable not by the efforts of any single nation, but only at a global level.<sup>30</sup>

Third, in contradistinction from traditional domestic legal regimes, whose norms are, as legal positivist theories emphasize, enforced through centralized systems of sanctions, emergent “soft law”<sup>31</sup> norms of “transnational new governance”<sup>32</sup> seem more closely related to public international law in the sense that they rely on decentralized enforcement mechanisms.<sup>33</sup> But unlike hard public international law, the enforcement and governance of soft law does not rest on traditional institutions of public authority.<sup>34</sup> Although corporate governance traditionally has been shaped by substantive law instituted by state authority, today’s transnational businesses perform their tasks within new confederations of authorities.<sup>35</sup> Spheres of authority that were historically restricted to government are being shared with a multiplicity of non-state delegations.<sup>36</sup>

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<sup>29</sup> See Special Representative of the Sec’y Gen. on the Issue of Human Rights and Transnat’l Corps. and Other Bus. Enters., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Human Rights Council, ¶¶ 3, 16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Protect, Respect and Remedy*].

<sup>30</sup> Bhargava, *supra* note 3, at 1.

<sup>31</sup> “Soft law” generally refers to non-binding, quasi-legal instruments, or to mechanisms whose binding force is relatively weaker than conventional legal instruments. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 960 (2004); Alan C. Neal, *Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?*, 29 COMP. LAB. L. & POL’Y J. 459, 464 (2008). In international law parlance, “soft law” refers to international agreements not concluded as treaties and thus not yet binding. See Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100, 113–14 (Dinah Shelton ed., 2003). In addition, “soft law” denotes a self-contained set of obligations arising out of the occasional preference of nation-states to reach *non-binding* agreements and to pattern relations in ways that avoid application of treaty or customary law. Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 501 (1999).

<sup>32</sup> Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501, 501 (2009).

<sup>33</sup> See *id.* at 506.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 505.

<sup>36</sup> See *id.* at 505–06.



Fourth, there have been significant changes in the past several decades in the way business has been conducted.<sup>37</sup> With the advent of policies such as deregulation, liberalization, and privatization, and their propagation across the planet in the 1980s and 1990s, a change came about in the structure and the size of the global marketplace, together with a shift in power relations in the global political economy.<sup>38</sup>

Within this dynamic, states are relinquishing some of their power in both domestic and international spheres.<sup>39</sup> It is against this backdrop that the efficacy of states as exclusive guardians of fundamental rights has been called into question.<sup>40</sup> Further, calls for expanding responsibility for sustainability and human rights to non-state participants and into the private domain have intensified.<sup>41</sup>

Yet it remains unclear how and to what extent a broadening of such responsibilities into the private arena can and should occur. Especially from the standpoint of international law, these protracted interpretations of non-state responsibilities toward sustainability and human rights appear to be raising more questions than providing definitive answers. Ordinarily states are taken to be the only entities to which an international legal personality is ascribed, rendering them the sole addressees of international law.<sup>42</sup> By extension, then, they are the exclusive bearers of direct international legal obligations.<sup>43</sup> Consequently other institutions carry indirect responsibilities, with regard to human rights for instance, insofar as the respective states specify them in municipal law.<sup>44</sup> Nevertheless, they are not considered as obligated directly by international law.<sup>45</sup>

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<sup>37</sup> See Douglass Cassel, *Human Rights and Business Responsibilities in the Global Marketplace*, 11 BUS. ETHICS Q. 261, 265–66 (2001).

<sup>38</sup> See generally Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.–Feb. 1997, at 50 (describing the devolution of influence and authority from states to NGOs in the last fifty years).

<sup>39</sup> See Hall & Biersteker, *supra* note 22, at 4.

<sup>40</sup> Zehra F. Kabasakal Arat, *Looking Beyond the State but Not Ignoring It: A Framework of Analysis for Non-State Actors and Human Rights*, in NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE 3, 4–6 (George Andreopoulos, Zehra F. Kabasakal Arat, & Peter Juviler eds., 2006).

<sup>41</sup> See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 1 (2006); PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS 5–6 (2005); Arat, *supra* note 40, at 5–6; see also DAWN OLIVER & JÖRG FEDTKE, HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 9–13 (2007).

<sup>42</sup> See Hall & Biersteker, *supra* note 22, at 3.

<sup>43</sup> See *id.*

<sup>44</sup> Muchlinski, *supra* note 9, at 150–51.

<sup>45</sup> *Id.* at 151.

Thus, a good deal of the inquiry into the nature and authority of soft law regimes pivots around the question of the sufficiency of state-centrism or governmental exclusivity regarding initiatives for sustainability and human rights.<sup>46</sup> Consequently, at a point where authority and power are split up and pooled between state and non-state agents, and where partitions between the private and the public domains are falling away, the challenge at the core of the business and human rights debate is becoming one of reinterpreting and redesigning global economic governance regimes to include and expect—if not outright demand—heighted levels of responsibility from non-state actors, especially corporations.<sup>47</sup>

Within the sphere of transnational new governance, civil regulations are normally interpreted as existing alongside nation-states, rather than inside of a state structure.<sup>48</sup> The advent of soft law's regulatory influence outside nations' regulatory schemes has empowered transnational non-state actors.<sup>49</sup> The upshot is that the private sector has assumed a much more prominent public position, and private authorities'—especially corporations'—role in transnational economic regulation is intensifying.<sup>50</sup> As mentioned previously, the regulatory power of the state is undergoing extensive decentralization under the influence of globalization.<sup>51</sup> Blendings of state and market, public and private, and traditional and self-regulatory institutional structures, characterized by collaborations among states, NGOs, and companies, are supplementing the traditional style of hierarchically ordered regulation.<sup>52</sup>

Public policy that used to be created and enforced at the domestic level through official regulatory organs, such as environmental boards and employment nondiscrimination panels, is being conducted instead at the global level by means of dialogue, negotiation, and cooperation

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<sup>46</sup> See, e.g., Lawrence S. Finkelstein, *What Is Global Governance?*, 1 GLOBAL GOVERNANCE 367, 367–68 (1995) (stating that problems such as human rights need to be solved by private actors in addition to governments).

<sup>47</sup> *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 1–8.

<sup>48</sup> Virginia Haufler, *Globalization and Industry Self-Regulation*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 226, 226 (Miles Kahler & David A. Lake eds., 2003).

<sup>49</sup> See VIRGINIA HAUFLER, THE PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 12–15 (2001); Hall & Biersteker, *supra* note 22, at 3–4.

<sup>50</sup> See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 11–14 (Lester M. Salamon & Odus V. Elliott eds., 2002).

<sup>51</sup> See O'Connell, *supra* note 31, at 101.

<sup>52</sup> See Lobel, *supra* note 14, at 498 (discussing employment disputes, organizational compliance, financial regulation, and employee misconduct).

between public and private sectors.<sup>53</sup> Thus, global business regulatory instruments are undergoing transformation.<sup>54</sup> Global business regulation is no longer limited to administrative and legislative activity.<sup>55</sup> It encompasses market-oriented agents that impose business disclosure, monitoring, reporting, and transparency requirements, backed with reputation sanctions to address corporate malfeasance.<sup>56</sup>

Civil regulations, however, do not displace the governing activities of nation-states.<sup>57</sup> Instead, they institute governance systems within wider global structures of social capacity and agency.<sup>58</sup> The advent of civil regulation signals the emergence of a global “governance triangle,” an arrangement in which nation-states represent only one among multiple sources of global regulatory authority.<sup>59</sup>

Prompted by the rise of economic globalization in the 1990s, the notion of governance *sans* government began appearing in scholarly work, underscoring the changes that globalization introduces in the governance structure of international society.<sup>60</sup> The word “governance” designates the activities of self-organizing systems that stand alongside the hierarchies and markets within which government structures are contained.<sup>61</sup> Building upon that idea, the locution “global governance” refers to the expansion of the sphere of influence of governing structures to entities beyond nation-states that do not possess sovereign authority.<sup>62</sup> It is important to recognize the conceptual distinction between governance and government. In contradistinction from the idea of government, which is associated with authoritative and centralized

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<sup>53</sup> See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–76 (2004); see also David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency*, 17 BUS. ETHICS Q. 453, 455 (2007).

<sup>54</sup> See Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 658–59 (1989).

<sup>55</sup> See LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 39–40 (1983); O’Connell, *supra* note 31, at 110.

<sup>56</sup> See Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 165–68 (2008).

<sup>57</sup> See John Gerard Ruggie, *Reconstituting the Global Public Domain: Issues, Actors and Practices*, 10 EUR. J. INT’L REL. 499, 519 (2004).

<sup>58</sup> *Id.*

<sup>59</sup> Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards, Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44, 48–50 (Walter Mattli & Ngaire Woods eds., 2009).

<sup>60</sup> See, e.g., Finkelstein, *supra* note 46, at 367–68 (defining “governance”).

<sup>61</sup> See R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652, 660 (1996).

<sup>62</sup> Finkelstein, *supra* note 46, at 369.

control of the state, governance connotes a process founded on absence of centralized forms of governmental authority.<sup>63</sup> Ideally, global governance undertakes the role within the international realm that governments characteristically assume within the nation-state.<sup>64</sup>

Some scholars suggest that global governance should be understood as a fusion of public, private, and civil-society organizations involved in a shared endeavor, where the term “governance” conveys a “public” meaning expressive of the sort of function that governments typically have assumed.<sup>65</sup> International economic actors that are perceived by civil society as legitimate are “governmental” in the way in which they exercise social control by promulgating norms (standards of behavior) and laws (rules of behavior).<sup>66</sup> Global economic governance regimes—not unlike national governments—represent structures of authority that rest on institutionalized international practices and generally accepted norms.<sup>67</sup> Indeed, nongovernmental bodies are morally comparable to governmental bodies in the sense that both “are expected to be accountable and open to opposition.”<sup>68</sup> Otherwise they will tend to suffer an erosion of their legitimacy.<sup>69</sup> Whether we are speaking of transnational companies such as Google, NGOs such as Amnesty International, or IGOs such as the World Trade Organization (WTO), organizations’ authority to expound the virtues of social responsibility, good governance and moral accountability to others will be gravely compromised by any departures from these values that crops up in their own behavior.

Thus, although efforts aimed at global governance are being undertaken by a variety of private and public actors across the spectrum of civil society, it is this public character underlying the idea of governance that triggers this Article’s inquiry into whether and to what extent, when global economic governance takes place, it does so under color of the rule of law. This demand for broad juridical justification is particularly insistent given that global governance purports to deal au-

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<sup>63</sup> See Rhodes, *supra* note 61, at 657.

<sup>64</sup> See James N. Rosenau, *Citizenship in a Changing Global Order*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 272, 286–87 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

<sup>65</sup> Donahue, *supra* note 24, at 2.

<sup>66</sup> See Rhodes, *supra* note 61, at 652–55.

<sup>67</sup> See *id.*

<sup>68</sup> Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 383 (1999).

<sup>69</sup> See *id.*

thoritatively with international human rights, which are distinctively moral and juridical concepts resting at the core of the rule of law.<sup>70</sup>

With this background in mind, we may examine a trio of jurisprudential models to deepen inquiry into soft law regimes, especially regarding these regimes' congruence with rule of law and human rights. These models are legal positivism, legal pragmatism, and natural rights theory.

## II. JURISPRUDENTIAL PARADIGMS FOR GLOBAL ECONOMIC GOVERNANCE

### A. *Legal Positivism (Descriptive View of Law)*

A positivist approach to law holds that all law must be posited by some sort of institution.<sup>71</sup> It denies that there is any natural dimension to law.<sup>72</sup> Correspondingly, positivism claims that all rights are positive rights.<sup>73</sup> Jeremy Bentham famously decried that “[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.”<sup>74</sup>

Positivism recognizes as valid only those obligations and rights that are identifiable as a matter of brute fact based on empirical criteria, such as actual conventions and practices of a determinate community.<sup>75</sup> Positivism therefore would proceed from a “scientific” conception of soft law, being concerned only with its descriptive features, not its moral legitimacy.<sup>76</sup>

### 1. Austin's Command Theory

John Austin's version of positivism is known as the “command theory.” Austin argues that it is up to jurisprudence to separate “improp-

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<sup>70</sup> See, e.g., José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 258–59, 262 (2011) (discussing, *inter alia*, flaws in global governance, “that global governance regimes can manifest the ‘international rule of law,’” and noting that international lawyers and human rights advocates often consider the erosion of national sovereignty as progress toward the goals of human rights).

<sup>71</sup> See Irma J. Kroeze, *Legal Positivism*, in JURISPRUDENCE 62, 65–66 (Christopher Roederer & Darrel Moellendorf eds., 2004).

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> JEREMY BENTHAM, *Nonsense upon Stilts*, in RIGHTS, REPRESENTATION AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317, 330 (Philip Schofield et al. eds., 2002).

<sup>75</sup> See Kroeze, *supra* note 71, at 66, 68–70.

<sup>76</sup> See *id.*

erly” called laws from “properly” called laws.<sup>77</sup> In the former category, Austin places scientific laws of nature and moral laws.<sup>78</sup> The latter category constitutes the commands of the sovereign.<sup>79</sup>

A “command” for Austin is an intention that a person act or not act in some manner.<sup>80</sup> Moreover, a command entails a threat of harm to the person who declines to obey that intention.<sup>81</sup> The sovereign command places a duty to obey upon the greater part of the population which is under the sovereign’s authority.<sup>82</sup> This duty to obey does not arise out of the morality or legitimacy of the command, but rather, out of the source of the command itself.<sup>83</sup>

Regarding judge-made law, Austin argues that a court’s authority to issue the sovereign command stems from the jurisdiction given the court by the sovereign.<sup>84</sup> For Austin, law is identified by reference to the obedient acts of the bulk of society carried out in accordance with the dictates of political superiors, who are themselves habitually obeyed and do not habitually obey anyone else.<sup>85</sup> The commands of the sovereign are the laws of the state.<sup>86</sup> Although the question of whether the commands of the sovereign are moral or not remains important for Austin, he does not consider it to be a legal question.<sup>87</sup> In Austin’s famous maxim, “[t]he existence of law is one thing; its merit or demerit is another.”<sup>88</sup>

## 2. Kelsen’s “Pure” Theory

According to Hans Kelsen, a legal norm is valid if it can be derived from a valid higher norm which is ultimately derived from the “basic norm.”<sup>89</sup> The basic norm determines which norms are legally valid and

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<sup>77</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 9–10 (Isaiah Berlin et al. eds., Weidenfeld and Nicholson 1954) (1832).

<sup>78</sup> *Id.* at 12–13.

<sup>79</sup> *Id.* at 34.

<sup>80</sup> *See id.* at 13–14.

<sup>81</sup> *See id.* at 14.

<sup>82</sup> *See id.* at 24–25.

<sup>83</sup> *See* AUSTIN, *supra* note 77, at 24–25.

<sup>84</sup> *Id.* at 31.

<sup>85</sup> *See id.* at 193–94.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 184.

<sup>88</sup> *See id.*

<sup>89</sup> HANS KELSEN, *THE PURE THEORY OF LAW* 31 (Max Knight trans., Univ. of Cal. Press 1967) (1966).

also justifies why they should be obeyed.<sup>90</sup> Kelsen writes, “[b]y the word ‘validity’ we designate the specific existence of a norm.”<sup>91</sup> And, in addition:

To say that a norm is “valid” . . . means something else than that it is actually applied and obeyed; it means that it *ought* to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree.<sup>92</sup>

For Kelsen, the existence of a valid norm implies that there is a duty to obey that norm.<sup>93</sup> Kelsen argues that the duty to obey may be implied by casting legal norms into the following logical form: if A is, then B ought to be.<sup>94</sup> This form of rule does not itself create a duty. Rather, the duty derives from the negation of a delict.<sup>95</sup> Thus, Kelsen states that “the statement that somebody is legally obligated (has a legal duty) to behave in a certain way, refers to a behavior which is the opposite of the behavior that is the condition of a coercive act as a sanction.”<sup>96</sup> It does not make sense to speak of what someone “ought” to do, for, according to Kelsen’s formulation, an official is directed to impose a sanction only when some delict is committed.<sup>97</sup> As Kelsen states: “legal obligation is not . . . the behavior that ought to be. Only the coercive act, functioning as a sanction, ought to be.”<sup>98</sup>

Under Kelsen’s theory, the validity of a norm comes from some higher norm, and not directly from any empirical fact.<sup>99</sup> To render the positive legal order meaningful, Kelsen presupposes a basic norm which gives validity to a hierarchy of legal norms, despite the fact that the basic norm is not itself a part of the legal system.<sup>100</sup> Introducing the basic

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 10.

<sup>92</sup> *Id.* at 10–11.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* at 115.

<sup>95</sup> *See* Kelsen, *supra* note 89, at 111.

<sup>96</sup> *Id.* at 119.

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* (footnote omitted). Under Kelsen’s theory, it is unclear how a citizen can ever be said to have a “duty” since there is apparently no “law” to be followed or transgressed. *See id.* Rather, the citizen may simply act in such a way that will direct officials to enforce certain sanction against him or her. *See id.*

<sup>99</sup> *See id.* at 201.

<sup>100</sup> *See id.* at 203–05.

norm into a coercive order brings legitimacy to that order.<sup>101</sup> It thereby becomes a legal order and may be distinguished from, say, the merely coercive order of Austin.<sup>102</sup> For Kelsen, the legal order becomes comprehensible only when a conceptual framework is brought to it.<sup>103</sup> That is, the conceptual act of presupposing the basic norm enables one to interpret a particular coercive order as being a legal system.<sup>104</sup>

### 3. Hart's "Rule of Recognition" Theory

Similar in function to Kelsen's basic norm is H.L.A. Hart's "rule of recognition," which establishes a criterion of validity for other rules and norms without any reference to their content.<sup>105</sup> Hart's rule of recognition also allows legal orders to be distinguished from merely coercive orders.<sup>106</sup> Whereas for Kelsen the basic norm remains something that must be brought to the coercive order to make it a legal order, Hart's rule of recognition belongs to the legal system by virtue of brute social fact.<sup>107</sup> Although the rule of recognition may determine the validity of a given rule, it may not determine the validity of the system conceived as a whole.<sup>108</sup>

A legal system exists for Hart when there is a union of primary and secondary rules, and a majority of a social group generally obeys primary rules while officials take an internal view of secondary rules.<sup>109</sup> Although the rule of recognition is within the legal system, it cannot be valid or invalid.<sup>110</sup> It is instead purely a matter of social fact.<sup>111</sup> As Hart writes:

We only need the word 'validity', and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid

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<sup>101</sup> See Kelsen, *supra* note 89, at 205.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 204–05.

<sup>104</sup> See *id.*

<sup>105</sup> See H.L.A. Hart, *THE CONCEPT OF LAW* 97 (Clarendon Law Series 1992) (1961).

<sup>106</sup> See *id.* at 20–25.

<sup>107</sup> See *id.* at 97; Kelsen, *supra* note 89, at 204–05.

<sup>108</sup> See Hart, *supra* note 105, at 103–04.

<sup>109</sup> See *id.* at 111–14.

<sup>110</sup> *Id.* at 107.

<sup>111</sup> See *supra* note 105 and accompanying text.



nor invalid but is simply accepted as appropriate for use in this way.<sup>112</sup>

Hart's emphasis is on the *existence* of the rule of recognition—either it exists or it does not—whereas Kelsen stresses the *validity* of the basic norm—it is either presupposed to be valid or it is not.<sup>113</sup> Hart distinguishes the rule of recognition from the basic norm so that one can discern whether or not a legal rule really exists.<sup>114</sup> A rule will exist when it is “valid given the system’s criteria of validity.”<sup>115</sup>

Thus, Hart is concerned with what is meant by the claim that a given rule is valid within a particular system of law, whereas Kelsen is concerned with how to determine whether a given coercive order can be said to be within a system of law.<sup>116</sup> Accordingly, the rule of recognition is internal to the legal system, while the basic norm is external to the system.<sup>117</sup>

#### 4. Positivism’s View of International Law

The above-mentioned influential positivist thinkers typically have taken exaggerated stances on the legal status of international law.<sup>118</sup> At one extreme the positivist skeptics of international law, such as Hart, see all international legal norms either as mere “positive morality” or as a kind of “primitive” or “quasi” variety of defective law.<sup>119</sup> Some positivists offer more nuanced interpretations that make distinctions about the legal status of different kinds of instruments within the realm of international law, such as treaties between states, recognized as genuine sources of international law, and others, such as non-treaty agreements between states, as mere “*pré-droit*.”<sup>120</sup>

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<sup>112</sup> HART, *supra* note 105, at 105–06.

<sup>113</sup> See *id.* at 107; KELSEN, *supra* note 89, at 193.

<sup>114</sup> HART, *supra* note 105, at 245.

<sup>115</sup> *Id.* at 107.

<sup>116</sup> See *id.* at 107; KELSEN, *supra* note 89, at 108.

<sup>117</sup> See HART, *supra* note 105, at 107; KELSEN, *supra* note 89, at 108.

<sup>118</sup> See THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 185 (1990).

<sup>119</sup> AUSTIN, *supra* note 77, at 125–26; see HART, *supra* note 105, at 3–4.

<sup>120</sup> Hillgenberg, *supra* note 31, at 502. For example, Hartmut Hillgenberg states that “[s]oft law” may sometimes be “*pré-droit*” in the sense that it leads to treaty obligations.” *Id.* Hillgenberg’s positivist assumption throughout the article is that only commitments between states (i.e., treaty agreements) are “sources of law.” *Id.* at 506. So long as non-treaty agreements, even those between states,

are not recognized in international law as a source of legal obligations and are not provided with a set of rules regulating their coming into existence, functioning and effects, they remain ‘closed.’ Outside the regime created by

At the other extreme, positivist anti-skeptics argue that because international law bears many empirical similarities to domestic law (for example, existence of *de facto* enforcement mechanisms or sanctions), it must be “law” after all.<sup>121</sup> Taking a positivist jurisprudential stance might seem promising in our comprehension of soft law, because soft law is often “enforced” through reputational sanctions that—although decentralized and delivered more by the various elements of civil society than by states—often substantially reinforce civil regulations, and international law in general.<sup>122</sup> Although this Article will discuss the connection between reputational sanctions and pragmatist accounts, this Section needs only to note their relevance to positivist portrayals.

Although today’s emerging civil regulations are in some respects dissimilar to traditional hard law enforcement regimes, wherein non-compliance with rules is met with imposition of sanctions, they are nevertheless arguably tied to what might be termed a “rule of reputation,” which in its own way links accountability for norms to informal sanctions and rewards that affect reputation capital.<sup>123</sup>

The concept of reputation capital recognizes that social expectations of corporate responsibility are intensifying.<sup>124</sup> When civil regulations are breached, the breaches can cause direct reputational harm, triggered by perceptions across civil society that important social contracts have been breached, and consequently a reduction in corporate

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the non-treaty agreements, rules of international law presently take account of such agreements only as a factor, not as a source, of law.

*Id.* at 515.

<sup>121</sup> Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293, 1314 (1985).

<sup>122</sup> Sia Spiliopoulou Åkermark, *Soft Law and International Financial Institutions: Issues of Hard and Soft Law from a Lawyer’s Perspective*, in *SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS* 61, 77 (Ulrika Mörtz ed., 2004); Andrew T. Guzman, *International Law: A Compliance Based Theory* 61–64 (UC Berkeley Pub. Law & Legal Theory Working Paper Series, Working Paper No. 47, 2001), available at <http://ssrn.com/abstract=260257>.

<sup>123</sup> “Reputation capital” denotes a firm’s intangible long-term strategic assets deployed to produce profits. GRAHAME DOWLING, *CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE* 23–24 (2001). The reputation capital of a firm is a fusion of economic values and moral values. *See id.*; *see also* CHARLES J. FOMBRUN & CEES B.M. VAN RIEL, *FAME & FORTUNE: HOW SUCCESSFUL COMPANIES BUILD WINNING REPUTATIONS* 32–35 (2004) (discussing “perceptual” and “social” assets). *See generally* RONALD J. ALSOP, *THE 18 IMMUTABLE LAWS OF CORPORATE REPUTATION* 17 (2004) (stating guidelines for managing corporate reputation); CHARLES J. FOMBRUN, *REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE* 1 (1996) (illustrating the importance of reputation in business).

<sup>124</sup> *See* ALSOP, *supra* note 123, at 10–11.

reputation assets results.<sup>125</sup> On the other hand, when expectations are satisfied from compliance with civil regulations, a firm's reputation capital is preserved or even increased.<sup>126</sup> Accordingly, many states, corporations, IGOs, and NGOs are drawn toward compliance with soft law because compliance enhances their reputation as respected actors on the global stage.<sup>127</sup> From a jurisprudential perspective, legitimacy partially compensates for the absence of enforcement mechanisms, thus justifying a positive reassessment of the effectiveness of soft law and explaining patterns of seemingly voluntary compliance with soft law norms and international obligations.<sup>128</sup>

The notion of reputation capital has grown to prominence alongside the ideal of free-market capitalism, which has undergone adjustment with civil society increasingly setting its eyes on corporate social responsibility (CSR).<sup>129</sup> Corporate commitments to CSR are being reinforced by an emerging constellation of global civil regulations.<sup>130</sup> In legal positivist terms, the cash value of "sanctions" handed down for noncompliance with civil standards is reckoned as reputational loss.<sup>131</sup> Reputational gain is the incentive for complying with the standards.<sup>132</sup> Accordingly, emerging "accountability regimes" sanction corporations for breaches of their CSR.<sup>133</sup>

To summarize this discussion of legal positivism's approach to transnational governance, positivist skeptics and anti-skeptics are polarized by how they answer whether international law is really "law."<sup>134</sup> In the final analysis, however, this question amounts to something of a red herring because the question of legality is not simply a descriptive or empirical issue, as positivists would have it, but rather a normative issue

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<sup>125</sup> See Thomas Donaldson, *'Ethical Blowback': The Missing Piece in the Corporate Governance Puzzle—The Risks to a Company Which Fails to Understand and Respect Its Social Contract*, 7 CORP. GOVERNANCE 534, 534–36 (2007).

<sup>126</sup> See ALSOP, *supra* note 123, at 68–83.

<sup>127</sup> KEVIN JACKSON, BUILDING REPUTATIONAL CAPITAL 25–35 (2004).

<sup>128</sup> See FRANCK, *supra* note 118, at 195–203 (addressing the reputation dynamic among nation-states).

<sup>129</sup> See JACKSON, *supra* note 127, at 25–35; Edwin Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 214, 219 (2007).

<sup>130</sup> See Epstein, *supra* note 129, at 214, 219.

<sup>131</sup> See HAUFLER, *supra* note 49, at 26–27.

<sup>132</sup> See Olivier De Schutter, *Multinationals in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS 227, 260–62 (Philip Alston ed., 2005).

<sup>133</sup> See *id.*

<sup>134</sup> See *supra* text accompanying notes 118–122.

as well. As such, the question is not resolvable only by reference to facts, but also engages ethical concepts and moral argumentation.

Such positivist accounts of law also wrongly equate features and conditions taken as appropriate for analysis of the validity of domestic law with features and conditions pertaining to the validity of (hard) international law, and by extension, soft law configurations as well.<sup>135</sup> Additionally, they are misled in the way they treat legal validity itself.<sup>136</sup> Whatever the merits of positivist theories in articulating prominent features of valid national law, such as enforceability, centrality of enactment, and rule-like character, there is no core of features constituting what law “really” is.<sup>137</sup> At best, some features of legality are more or less typical of what we deem clear instances of law. Thus, positivist construals of general international law that attempt to clarify the target of their investigation by appealing to fundamental criteria such as state consent and customary practice—themselves obscure notions—are in the end explaining *obscurum per obscurius*.<sup>138</sup> Gaining a conceptual grasp on the complex status of international legal validity in its manifold forms need not involve the assumption of a single fundamental test any more than would be necessary for treating the concept of legal validity in domestic law.<sup>139</sup>

Even if positivist characterizations of domestic law as the command of the sovereign, or as relatively centralized systems derivable from a basic norm, are accepted *arguendo* as accurate ones, it simply does not follow that such characterizations are sufficient as definitions for law in all of its possible applications.<sup>140</sup> It is one thing to make an adverse comparison between what are taken to be essential features of domestic law on the one hand, and international law or even soft law on the other.<sup>141</sup> It is quite a different assertion, however, to say that domestic

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<sup>135</sup> Cf. D’Amato, *supra* note 121, at 1294–95 (discussing whether non-coerced government compliance with constitutional and criminal law decisions renders certain domestic law any less “legal”).

<sup>136</sup> See *id.*

<sup>137</sup> Cf. FRANCK, *supra* note 118, at 41–49 (describing the extent to which certain international rules require compliance).

<sup>138</sup> See, e.g., Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT’L L. 805, 815 (2009) (“International law is a patchwork, made up of many diverse and conflicting principles and agendas. It is not simply politically messy, as positivists claim; it is also conceptually messy.”); *Obscurum per Obscurius*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/obscurum%20per%20obscurius> (last visited Jan. 31, 2013) (defining “obscurum per obscurius” as “(explaining) the obscure by means of the more obscure”).

<sup>139</sup> See FRANCK, *supra* note 118, at 41–49.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 29.

law and soft law belong in completely different classes, and to further conclude that the former is entitled to classification as law and the latter not.<sup>142</sup> There may be great differences between two objects of the same general class—delivery trucks and motorcycles for example—but it does not follow logically from a descriptive listing of the many empirical differences between these two kinds of objects that they are not both properly understood as vehicles.<sup>143</sup> Granted, they are quite different kinds of vehicles in terms of their specific properties, but they still share the same status as vehicles. For our purposes in seeking a jurisprudential paradigm suitable for understanding global economic governance regimes, we may note that these theoretical inadequacies for an account of international law turn out to be magnified regarding international soft law.

### B. *Legal Pragmatism (Instrumental View of Law)*

Alongside positivism, another viewpoint, one that may be termed legal pragmatism, derives from a number of different theories of law that originated in the legal realist school.<sup>144</sup> The two most prominent pragmatist approaches in contemporary jurisprudence are critical legal studies and law and economics.<sup>145</sup> Pragmatist theories accept in common the premise that, whether one is considering a domestic or international context, all that law can ever amount to is policy.<sup>146</sup> Pragmatism is grounded in an instrumental mindset that conceives of the nature of law as simply a decision process, not as a coherent system of rules.<sup>147</sup> To the extent that law engages rules it does so only to promote the utilitarian objective of generating desired outcomes.<sup>148</sup> The authority of such rules derives from their effectiveness in realizing such outcomes.<sup>149</sup>

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<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 127 (2006).

<sup>145</sup> See *id.* at 120–30.

<sup>146</sup> See Warner, *supra* note 17, at 539 (“Sometimes [pragmatism] connotes . . . taking a serious interest in practical politics and the realities of human well-being and suffering . . .”).

<sup>147</sup> See Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 169–70.

<sup>148</sup> See TAMANAHA, *supra* note 144, at 128.

<sup>149</sup> See *id.*

## 1. Critical Legal Studies

As a postmodernist portrayal of law, the school of critical legal studies (CLS) comprehends law as a form of “discourse” lacking objective moral legitimacy, or as a collection of indeterminate pronouncements incapable of being rendered sufficiently determinate by a concept such as the rule of law.<sup>150</sup> Some of the more radical skeptics of law<sup>151</sup>—following the work of Foucault,<sup>152</sup> Derrida,<sup>153</sup> and other opponents of modernity—attack efforts to apply the concept of law to the sphere of politics, and even reject the notion of law as a coherent foundation for human coordination and collaboration.<sup>154</sup> At its best, law amounts to no more than a self-referential amalgam of symbols for which meaning is utterly obscure and drastically indeterminate.<sup>155</sup> At its worst, law is a kind of malicious discourse that both creates and rationalizes political arrangements for human subjugation.<sup>156</sup> One scholar characterizes the CLS indictment of incoherence and contradiction against the rule of law in terms of three propositions: the patchwork thesis, the duck-rabbit thesis, and the truncation thesis.<sup>157</sup>

### a. *Patchwork Proposition*

According to the patchwork proposition, the occurrence of “gaps, conflicts, and ambiguities” in legal rules requires deployment of general principles to “patch together” (for instance, render consistent and coherent) the resultant imperfections in the fabric of legal doctrine.<sup>158</sup> Because principles remain indeterminate due to their generality, however, the patchwork thesis maintains that no “rational reconstruction”

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<sup>150</sup> See E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL’Y 415, 422–25 (2000) (“By placing a belief in indeterminacy squarely at the center of judicial rhetoric, CLS challenged the importance of the vindication of rights . . .”).

<sup>151</sup> See, e.g., Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 623–24 (1984).

<sup>152</sup> See generally ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994) (examining Foucault’s treatment of law).

<sup>153</sup> See generally Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell et al. eds., 1992).

<sup>154</sup> See Tushnet, *supra* note 151, at 623–24, 627–28.

<sup>155</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* 6–7 (1970); Shannon Hocht, *Legal Realism*, in *JURISPRUDENCE*, *supra* note 71, at 158, 168–69 (discussing Frank’s view that legal rules are simply words that derive meaning only from corresponding real-world facts).

<sup>156</sup> See WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, *LAW, ORDER, AND POWER* 13 (1971); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045, 1050 (1992).

<sup>157</sup> See ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 4–5 (1990).

<sup>158</sup> See *id.* at 118.

for legal doctrine can render it consistently integrated by one moral outlook.<sup>159</sup> Hence, the high degree of indeterminacy about the law is criticized as unacceptable for the rule of law.<sup>160</sup> Moreover, the contradictions in legal doctrine embodied in its patchwork normative texture are grounded in “starkly incompatible ethical viewpoints.”<sup>161</sup> This is reflected, for instance, in the extremes of individualism on the one hand and altruism on the other.<sup>162</sup>

The kind of international legal doctrine associated with interpretations of soft law civil regulations and with human rights interpretations are within the scope of the patchwork thesis.<sup>163</sup> Gaps in doctrine occur when, for instance, one country ratifies human rights legislation while another does not.<sup>164</sup> One example of this was the United States’ refusal to subscribe to the World Health Organization’s infant formula code, which regulates marketing practices for breast milk substitutes in developing countries, despite its acceptance by 118 other nations.<sup>165</sup> Conflicts arise when a party cannot comply with two treaties simultaneously, as one treaty prohibits what is allowed in the other or requires an opposite course of action.<sup>166</sup>

Other conflicts exist when a single economic actor, such as a corporation, is faced with contradictory mandates depending on the country (home or host) in which it is operating.<sup>167</sup> A case involving Dresser Industries, a company based in the United States with a subsidiary in France, illustrates this situation.<sup>168</sup> U.S. law imposed sanctions against subsidiaries of U.S. firms for selling equipment to the former Soviet Union for a gas pipeline from Siberia to Western Europe.<sup>169</sup> French law, on the other hand, ordered Dresser of France to honor its contract to supply gas compressors.<sup>170</sup>

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<sup>159</sup> See *id.* at 117.

<sup>160</sup> See *id.* at 117–20.

<sup>161</sup> *Id.* at 105.

<sup>162</sup> *Id.* at 120.

<sup>163</sup> Cf. *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 1–9 (describing the global governance gaps).

<sup>164</sup> See *id.*

<sup>165</sup> See, e.g., Michael deCourcy Hinds, *Many Nations Adopting Infant-Formula Code*, N.Y. TIMES, May 2, 1982, <http://www.nytimes.com/1982/05/02/world/many-nations-adopting-infant-formula-code.html>.

<sup>166</sup> See C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 426 (1953).

<sup>167</sup> See GEORGE ALBERT STEINER & JOHN F. STEINER, *BUSINESS, GOVERNMENT, AND SOCIETY: A MANAGERIAL PERSPECTIVE* 117–18 (5th ed. 1988).

<sup>168</sup> See *id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

Other instances involving conflicts require judgment concerning the respective weighing of opposing authorities, such as conflict between the WTO system and Multilateral Environmental Agreements.<sup>171</sup> Conflicts may also arise where WTO rules conflict with other provisions of public international law, and where other tribunals make concurring claims.<sup>172</sup> Ambiguities appear when human rights standards are broadly stated, and thus amenable to differing interpretations depending on ideological orientation, level of economic development, and the national legal environment of the host country.<sup>173</sup>

The problem of uncertainty has a special significance in interpretations of soft law. Where there is substantial uncertainty about the conventions of nation-states concerning, for example, the exercise of diplomatic asylum, courts will find that no custom exists upon which to predicate a binding obligation.<sup>174</sup> One should notice in this regard that the concept of uncertainty is a relative one, used to distinguish binding customs from practices that do not have substantial uniformity.<sup>175</sup>

b. “Duck-Rabbit” Premise

The “duck-rabbit”<sup>176</sup> premise asserts that “the structure of legal doctrine can be organized in radically different ways, depending upon which of two incompatible ethical viewpoints one adopts.”<sup>177</sup>

Regarding the international relevance of CLS, it is perhaps more apt to identify the dominant tension between rival ethical traditions not so much as a conflict between the extremes of individualism and altruism (as in the Kennedy<sup>178</sup> and Unger<sup>179</sup> works), but as a conflict between standards of developed versus developing countries, or between

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<sup>171</sup> JOOST PAUWELYN, CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 328–43 (2003).

<sup>172</sup> *Id.* at 10–11.

<sup>173</sup> See FRANCK, *supra* note 118, at 189–90.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> The terminology follows Ludwig Wittgenstein’s example. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 193–95 (G.E.M. Anscombe trans., 2d ed. 1958), available at <http://gormendizer.co.za/wp-content/uploads/2010/06/Ludwig.Wittgenstein.-.Philosophical.Investigations.pdf>.

<sup>177</sup> ALTMAN, *supra* note 157, at 105. Altruism and individualism provide a possible example of incompatible ethical viewpoints.

<sup>178</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1735–37 (1976).

<sup>179</sup> ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 83–85 (1986).



the “global north” and “global south.”<sup>180</sup> The recurrent debates between developed and developing country representatives transpiring at the Earth Summits are illustrative.<sup>181</sup>

The debate that surrounded the proposed United Nations (UN) Code of Conduct for Transnational Enterprises was dominated by a conflict over whether international norms from the traditional conception of international law (customary law of state responsibility) and from “international obligations” (for example, treaties, conventions, and agreements based on the express consent of the concerned states) would, on one hand, tend to favor the interests of developed market-economy countries, or, on the other hand, favor the interests of developing countries.<sup>182</sup> In general, developing nations tended to agree on the need to stimulate their economies by permitting free trade and private enterprise to flourish.<sup>183</sup> Nevertheless, they remained skeptical about the perceived ability of developed nations to manipulate international law to their own benefit and advantage, with a resultant prejudicial impact on developing countries.<sup>184</sup> The counterargument advanced by representatives of the developed countries at times was that the sheer number of developing countries would provide them great ability to actively shape the evolution of international law to their benefit.<sup>185</sup> Further, the argument maintained that the trend in emerging

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<sup>180</sup> See Lawrence Susskind, *Barriers to Effective Environmental Treaty-Making*, in *Barriers to Conflict Resolution* 293, 293 (Kenneth Arrow et al. eds., 1995).

<sup>181</sup> See *id.*

<sup>182</sup> DETLEV F. VAGTS, U.N. CTR. ON TRANSNAT'L CORPS., *THE QUESTION OF A REFERENCE TO INTERNATIONAL OBLIGATIONS IN THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS: A DIFFERENT VIEW*, at iii, U.N. Doc. ST/CTC/SER.A/2, U.N. Sales No. E.86.II.A.11 (1986).

<sup>183</sup> See Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. INT'L L. REV. 1275, 1276, 1287 (1995) (noting in a Code of Conduct post-adoption context developing states' prior “aspirations . . . to build viable self-sustaining and competitive economies”).

<sup>184</sup> See PATRICK ROBINSON, U.N. CTR. ON TRANSNAT'L CORPS., *THE QUESTION OF A REFERENCE TO INTERNATIONAL LAW IN THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS*, at 4, U.N. Doc. ST/CTC/SER.A/1, U.N. Sales No. E.86.II.A.5 (1986).

<sup>185</sup> See Louis Emmerij & Richard Jolly, *The UN and Transnational Corporations* 1–2 (UN Intellectual History Project, Briefing Note No. 17, 2009), available at <http://www.unhistory.org/briefing/17TNCs.pdf> (reviewing TAGI SEGAFI-NEJAD & JOHN H. DUNNING, *THE UN AND TRANSNATIONAL CORPORATIONS: FROM CODE OF CONDUCT TO GLOBAL COMPACT* (2008)) (alluding to international tensions and noting the experience of the United Nations Centre on Transnational Corporations with determining ways that developing countries can cooperate to ensure their own needs).

international law was to accord developing countries increased protection.<sup>186</sup>

Regardless of exactly how splits in international ideologies are described, it is clear that this component of CLS critique has an important bearing on the global economic governance context, particularly with respect to human rights.<sup>187</sup> Interpretations of human rights and their correlative duties can be construed in widely divergent ways, according to which of the possible legal, ethical, and cultural perspectives are adopted.<sup>188</sup> The problem appears concretely in situations in which global firms operate in different countries such as Japan, Egypt, Vietnam, Brazil, Germany, and so on.<sup>189</sup> Granted that a global company has a *prima facie* duty to provide fair conditions of employment, whose moral and legal standards should be used in deciding whether a given employment policy or practice is permissible?<sup>190</sup> Further, members of a community living under a lower level of economic development will tend to view the right to an adequate wage differently than members of an affluent community, seeming to lend support to the duck-rabbit hypothesis.<sup>191</sup>

Part of the global economic governance predicament may accordingly be characterized in terms of the duck-rabbit thesis as follows. Whereas the domestic form of the duck-rabbit thesis deals with the question of which parts of legal doctrine are “core” and which are “peripheral” in legal interpretation, the international form of the thesis deals with the question of which soft law standards (civil regulations or

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<sup>186</sup> *See id.*

[T]hese events produced vociferous demands by some developing countries, primarily in Latin America, to reshape the international economic order and, with it, the role and influence of FDI. In particular, the global reach of TNCs was perceived to be a patent symbol of lingering exploitation and dependence. Developing countries urged the UN to take action to ensure that TNCs better met their needs.

*Id.* at 1.

<sup>187</sup> *See, e.g.,* Jason Morgan-Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context*, 10 ILSA J. INT’L & COMP. L. 35, 36 (2003) (echoing the CLS critique of “acceptance of the oppressor view as neutral” in the human rights context).

<sup>188</sup> *See* United Nations International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; Morgan-Foster, *supra* note 187, at 39 (noting the various viewpoints on formulating universal human rights jurisprudence and setting forth divergent theories—universalism, cultural relativism, and moderate cultural relativism).

<sup>189</sup> *See* Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV., Sept.–Oct. 1996, at 48, 52.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

human rights norms) from which country or region will prevail and be recognized as authoritative.<sup>192</sup> Maintaining that developing country standards will prevail is a way of structuring a justifying doctrine according to the ideological viewpoint of those countries.<sup>193</sup> By contrast, holding that developed country standards will prevail is a way of structuring a justifying doctrine according to the ideological perspective of developed countries.<sup>194</sup>

c. “Truncation” Thesis

The “truncation” thesis of CLS holds that “the principles that underlie legal rules are not consistently applied to all of the cases over which they claim moral authority but are truncated well short of the full range of cases over which they claim authority.”<sup>195</sup> In the global economic governance context, a particularly striking example of truncation appears in John Ruggie’s *Protect, Respect and Remedy* framework for human rights, presented in Ruggie’s 2008 UN special report on human rights and transnational corporations.<sup>196</sup> In particular, Ruggie’s framework establishes a truncation of human rights obligations in the sense that, although it assigns such obligations to states, it ultimately falls short of attributing all of them to corporations as well.<sup>197</sup>

According to Ruggie’s UN Reports and their principles, a triadic segmentation for the framework is established, namely: the state duty to protect, corporate responsibility to respect, and access to remedy.<sup>198</sup>

i. State Duty to Protect.

States have a duty under international law to protect the human rights of individuals within their territory or jurisdiction.<sup>199</sup> Also, international law requires states to take necessary measures to protect human rights against abuses by state and non-state actors, including business enterprises, through appropriate policy regulation and adjudica-

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<sup>192</sup> See ALTMAN, *supra* note 157, at 130–31.

<sup>193</sup> See INT’L COUNCIL ON HUMAN RIGHTS, HUMAN RIGHTS STANDARDS: LEARNING FROM EXPERIENCE 21–22 (2006), available at [http://www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf).

<sup>194</sup> See *id.*

<sup>195</sup> See ALTMAN, *supra* note 157, at 105.

<sup>196</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 18–26.

<sup>197</sup> See *id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* ¶ 18.

tion.<sup>200</sup> States are also obliged to take appropriate steps to ensure that if human rights abuses occur within their territory or jurisdiction, the victims of such abuses have access to effective remedy.<sup>201</sup>

## ii. Corporate Responsibility to Respect

The corporate responsibility to respect human rights means that business enterprises should avoid infringing on the human rights of others, and should take adequate measures to address adverse human rights impacts with which they are involved.<sup>202</sup> According to this responsibility, business enterprises should respect internationally recognized standards of human rights in their business operations.<sup>203</sup> Because corporate responsibility to respect human rights is based on legal as well as moral or social responsibility grounds, a failure by a company to meet this responsibility may make the company subject not only to legal sanctions but also to consequences in the “court[] of public opinion.”<sup>204</sup>

The core component of this responsibility lies in carrying out human rights due diligence, which could be part of broader corporate risk-management systems.<sup>205</sup> If corporate activities go beyond the home state’s territory, a business entity headquartering a corporate group

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<sup>200</sup> Special Representative of the Sec’y Gen. on the Issue of Human Rights and Transnat’l Corps. and Other Bus. Enters., *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, Human Rights Council, ¶ 13, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) [hereinafter *Towards Operationalizing*]; *Protect, Respect and Remedy*, *supra* note 29, ¶ 18. There is disagreement on whether international law requires home states to help prevent overseas human rights abuses by businesses incorporated within their territory. See *Protect, Respect and Remedy*, *supra* note 29, ¶ 19. The 2008 and 2009 Reports confirm that international law does not prohibit states from regulating extraterritorial activities of businesses incorporated in their jurisdiction, provided there is a recognized jurisdictional basis with an overall test of reasonableness being met. See *Towards Operationalizing*, *supra*, ¶ 15; *Protect, Respect and Remedy*, *supra* note 29, ¶ 19.

<sup>201</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 26.

<sup>202</sup> Special Representative of the Sec’y Gen. on the Issue of Human Rights and Transnat’l Corps. and Other Bus. Enters., *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework*, Human Rights Council, ¶ 13, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) [hereinafter *Further Steps*].

<sup>203</sup> See *id.*

<sup>204</sup> *Protect, Respect and Remedy*, *supra* note 29, ¶ 54; John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 833 (2007).

<sup>205</sup> *Further Steps*, *supra* note 202, ¶ 85; *Protect, Respect and Remedy*, *supra* note 29, ¶ 56. Other IGOs refer to the concept, stipulating, for instance, that “[e]nterprises should . . . [c]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.” ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 31 (2011) [hereinafter OECD GUIDELINES], available at <http://dx.doi.org/10.1787/9789264115415-en>.

should conduct appropriate due diligence through its supply chain networks, which may cover a global extension to prevent potential human rights abuses or detect a possible abuse at an early stage.<sup>206</sup> This accords with social expectations.<sup>207</sup>

### iii. Access to Remedy.

According to Ruggie's 2009 Report "[a]ccess to effective remedy . . . is an important component of both the State duty to protect and of the corporate responsibility to respect."<sup>208</sup> This means that states and business enterprises should establish some types of judicial or non-judicial mechanisms for use by victims of human rights abuses.<sup>209</sup> Appropriate mechanisms include state-based judicial mechanisms, state-based non-judicial mechanisms, such as national human rights institutions (NHRIs), and national contact points (NCPs).<sup>210</sup> Also appropriate are non-state, non-judicial grievance mechanisms, which may involve an industry-led or a company-level grievance mechanism, aimed at detecting at early stages problems which otherwise could get worse and lead to human rights abuses.<sup>211</sup>

As for the content of obligation, for the state it is a *duty* to protect human rights, and for the business enterprise it is only a *responsibility* to respect human rights.<sup>212</sup> Moreover, the obligation includes the duty or responsibility to take and operate appropriate remedial or grievance mechanisms for victims of human rights.<sup>213</sup> The underlying norm for the state duty to protect is a legal norm, insofar as the state has a duty to protect human rights under international law.<sup>214</sup>

<sup>206</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 56–58.

<sup>207</sup> See *id.* ¶ 9.

<sup>208</sup> *Towards Operationalizing*, *supra* note 200, ¶ 86.

<sup>209</sup> See *id.* ¶¶ 87, 100.

<sup>210</sup> See *id.* ¶¶ 87, 102.

<sup>211</sup> See *Further Steps*, *supra* note 202, ¶¶ 89–113; *Towards Operationalizing*, *supra* note 200, ¶¶ 86–115; *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 82–103.

<sup>212</sup> See *Further Steps*, *supra* note 202, ¶¶ 55, 87.

<sup>213</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 82. An analysis of the Reports and the UN Guiding Principles on Business and Human Rights indicates that the documents use both mandatory and permissive phraseology, indicated by the words “must” and “should” respectively, in relation to state actions. For instance, Principle 1 stipulates that “[s]tates *must* protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.” UNITED NATIONS OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 3 (2011) [hereinafter GUIDING PRINCIPLES]. Principles 2 through 10 stipulate that states *should* take certain actions. See *id.* at 3–12.

<sup>214</sup> *Towards Operationalizing*, *supra* note 200, ¶ 13; *Protect, Respect and Remedy*, *supra* note 29, ¶ 18.

The main sources of corporate responsibility to respect are the moral or social norms existing in society.<sup>215</sup> The responsibility has a legal grounding to the extent the responsibility has already been legally provided in the domestic laws of a state.<sup>216</sup> Principle twenty-three of the UN Guiding Principles on Business and Human Rights states: “[B]usiness enterprises should . . . [c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate . . . .”<sup>217</sup>

This principle can be interpreted to suggest that businesses should respect internationally recognized human rights by complying with all applicable laws.<sup>218</sup> The Organization of Economic Co-operation and Development’s (OECD) Guidelines for Multinational Enterprises provides:

[e]nterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: [] Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.<sup>219</sup>

The CLS truncation thesis may criticize the framework by saying that international human rights obligations are not consistently assigned across the full range of cases over which they ought to be: as universal moral standards serving as a constraint on the power and discretion of global power players to claim authority.<sup>220</sup> In other words, they should extend to both states and to companies.<sup>221</sup>

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<sup>215</sup> *Towards Operationalizing*, *supra* note 200, ¶ 46; *Protect, Respect and Remedy*, *supra* note 29, ¶ 9.

<sup>216</sup> *See Towards Operationalizing*, *supra* note 200, ¶ 46.

<sup>217</sup> *See* GUIDING PRINCIPLES, *supra* note 213, at 25.

<sup>218</sup> *See id.* Business enterprises should comply with not only laws of the state where they operate (the host state), but by laws of the state where they were incorporated (the home state). *See Protect, Respect and Remedy*, *supra* note 29, ¶¶ 11–15. The degree to which businesses are bound by home states’ laws differs from state to state. *See id.* ¶ 14. The European Commission, as the Report notes, has tried to formulate conditions for states to help exercise jurisdiction over matters concerning their overseas business. *See Further Steps*, *supra* note 202, ¶ 13.

<sup>219</sup> OECD GUIDELINES, *supra* note 205, at 31.

<sup>220</sup> *See* Kobrin, *supra* note 5, at 364.

<sup>221</sup> *See id.* (“A clear set of internationally agreed upon [human rights] standards that are transparent and broadly applicable would benefit of [sic] transnational firms by removing uncertainty and leveling the playing field.”).

d. *CLS Critique in Perspective*

Although global economic governance is subject to “patchwork,” “duck-rabbit,” and “truncation” challenges, the purported indeterminacy and incoherence arising from those challenges does not necessarily warrant drawing the skeptical conclusion that the concepts of international rule of law and human rights are a sham.<sup>222</sup> Anticipating subsequent argument in this Article, viewing rule of law and human rights as regulative ideals (for example, principles demanding continuous vigilance to realize), rather than constitutive actualities (for instance, extant imperfections falling short of the ideals) overcomes the excessively skeptical objections that a CLS-oriented jurisprudence would level against global economic governance regimes.<sup>223</sup>

Rather than declaring human rights schemes illegitimate across the board, a better view would seek a non-instrumental conception of rule of law and human rights in place of the instrumental conception of pragmatism that has produced the truncation problem in the first place. Further, this view would examine whether such a non-instrumental conception provides a stronger basis from which to correct deficiencies in setting forth the human rights obligations of corporations.

2. Law and Economics

In addition to CLS, the other dominant branch of legal pragmatism is termed law and economics, or the economic analysis of law.<sup>224</sup> This paradigm analyzes law through the application of economic methods.<sup>225</sup> Brian Tamanaha explains that law and economics amounts to an instrumentalist approach to law:

The starting assumption of economic analysis of law is “that the people involved with the legal system act as rational maximizers of their satisfaction[s].” Armed with this assumption, practitioners of law and economics . . . set forth to examine the entire gamut of legal subjects, practices, and institutions . . . virtually every conceivable aspect of law. The analysis is monot-

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<sup>222</sup> See Edward Demenchonok, *The Universal Concept of Human Rights as a Regulative Principle: Freedom Versus Paternalism*, 68 AM. J. ECON. & SOC. 273, 294–96 (2009).

<sup>223</sup> See *id.* at 275.

<sup>224</sup> See TAMANAHA, *supra* note 144, at 118.

<sup>225</sup> See *id.*

onously instrumental, examining in every context whether law is an efficient means to designated ends.<sup>226</sup>

This model of jurisprudence presents a descriptive thesis that law functions mainly to maximize wealth in the sense that legal rules tend to promote transfers of goods and services to those parties that value them the most.<sup>227</sup> Law and economics proceeds from the prescriptive thesis that law should be directed toward the objective of wealth maximization.<sup>228</sup>

From the standpoint of law and economics, the justification offered to corporations for endorsing and implementing global governance regimes is an instrumental, functionalist characterization, centered on the concept that the purpose of the firm is to pursue profit maximization.<sup>229</sup> Under this paradigm, law, and consequently legal obligation, follows the dictates of economic mandates.<sup>230</sup> In the case of corporations, the economic drivers connect to the firm's economic self-interest.<sup>231</sup> Nevertheless, a closer examination demonstrates that a pragmatic law and economics justification of profit maximization is not able to support the rule of law and human rights agenda against competing business imperatives.<sup>232</sup>

Consider, as a preliminary observation, that there are dangers in relying on a law-and-economics-based pragmatist justification for soft law regimes. For one thing, NGOs are key players in the sustainability and human rights dialogues.<sup>233</sup> It is of paramount importance that the motivations of such stakeholders be based on secure normative foundations, such as the rule of law ideal and human rights. Although law and economics pragmatic argumentation is certainly not irrelevant to descriptive discussions of the emergence of soft law alongside hard law, the standards against which progress will be evaluated must not be limited

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<sup>226</sup> *Id.* (quoting Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 761 (1975)).

<sup>227</sup> *Id.* at 118–19.

<sup>228</sup> *Id.*

<sup>229</sup> *Cf.* TAMANAHA, *supra* note 144, at 119 (explaining how law can be used to achieve maximum social wealth using the wealth maximization proposition).

<sup>230</sup> *See id.*

<sup>231</sup> *See* JACKSON, *supra* note 127, at 50–53.

<sup>232</sup> *See* Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274, 276 (1983).

<sup>233</sup> *See* Wendy H. Wong, *Centralizing Principles: How Amnesty International Shaped Human Rights Politics Through its Transnational Network 2–3* (2008) (unpublished Ph.D. dissertation, University of California, San Diego), available at <http://escholarship.org/uc/item/5bs2w4b4>.



to empirical tests and hypothetical imperatives.<sup>234</sup> Instead, it should be based on normative standards grounded in categorical imperatives.<sup>235</sup>

Further, for some NGOs, such as Amnesty International, their very function and mission is to advance respect for human rights.<sup>236</sup> To be sure, from a public policy point of view, it is important that economic participants are active in developing soft law.<sup>237</sup> The moral impetus for them to do so, however, is based on a common public justification tied to the common good and the intrinsic value of human rights—not simply because doing so will advance their narrow instrumental aims.<sup>238</sup>

Necessity also requires considering the question of corporations. After all, it is their conduct that must change to achieve significant progress in emerging soft law initiatives.<sup>239</sup> Indeed their senior management and boards of directors will need to have compelling reasons—some plausible “business case”—for incorporating soft law initiatives into their operations that they can articulate to the shareholders and owners of the firm.<sup>240</sup>

Some might think that, because soft law regimes have been widely welcomed and endorsed by the business community, the issue of moral justification is beside the point.<sup>241</sup> That is not so. There is sometimes a wide gulf between endorsing soft law initiatives and implementing them, notwithstanding the persuasive pragmatic and strategic reasons for corporate endorsement.<sup>242</sup> The real test is implementation, not endorsement. This in turn necessitates making difficult choices based

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<sup>234</sup> See Michael Trebilcock, *The Value and Limits of Law and Economics*, in *THE SECOND WAVE OF LAW AND ECONOMICS* 12, 20 (Megan L. Richardson & Gillian K. Hadfield eds., 1999). Suppose that NGOs decide to model stakeholder preferences on the concept of Pareto efficiency or some other standard predicated upon extant utility functions. In that case, there would be nothing to rule out some stakeholder preferences as immoral, atrocious, or self-destructive; no room for considerations of distributive justice; and no restrictions on commodification. *See id.*

<sup>235</sup> See Hugo Slim, *Claiming a Humanitarian Imperative: NGOs and the Cultivation of Humanitarian Duty*, in *HUMAN RIGHTS & CONFLICT* 159, 164–65 (Julie A. Mertus & Jeffrey W. Helsing eds., 2006).

<sup>236</sup> See *Statute of Amnesty International*, AMNESTY INT’L ¶ 1 (Aug. 19, 2011), <http://www.amnesty.org/en/who-we-are/accountability/statute-of-amnesty-international>.

<sup>237</sup> See *Towards Operationalizing*, *supra* note 200, ¶ 10.

<sup>238</sup> See Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 349 (2006).

<sup>239</sup> See Ralph Steinhardt, *Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations*, 33 BROOK. J. INT’L L. 933, 936–37 (2008).

<sup>240</sup> See *Further Steps*, *supra* note 202, ¶¶ 75–77.

<sup>241</sup> See Steinhardt, *supra* note 239, at 937–38.

<sup>242</sup> See *Towards Operationalizing*, *supra* note 200, ¶¶ 18–19.

upon a variety of factors such as resource allocation, strategic planning, and daily management.<sup>243</sup> Thus, the central issue is whether the justificatory foundation of soft law regimes will be strong enough to hold up under the practical stresses and strains of corporate strategic planning and day-to-day operations.<sup>244</sup>

Undeniably, demonstrating that a course of action would enhance the bottom line is a strong practical justification for enlisting compliance with soft law by business enterprises.<sup>245</sup> As one scholar aptly stated, “[t]he question is whether such a demonstration is possible or likely to be seen as plausible when the costs and benefits associated with implementation are being calculated.”<sup>246</sup>

Returning to the discussion of Ruggie’s framework, this time we examine it not from the standpoint of CLS critique but instead through the lens of the pragmatist’s profit maximization criteria. As explained earlier, there is a tripartite normative architecture to Ruggie’s report.<sup>247</sup> First, there is the assertion that “[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization.”<sup>248</sup> Second is the assertion that the quintessential responsibility of the state inheres in its duty to protect human rights.<sup>249</sup> Third, there is the contention that business enterprises have only a responsibility, but not obligations or duties, to respect human rights.<sup>250</sup> Ruggie’s framework offers justification for each of these propositions.<sup>251</sup>

The first justificatory component, concerning “governance gaps,” seems to more properly refer not to a deficiency in governance in the sense distinguished earlier in this Article, but rather to *government* gaps in the sense of a discontinuity in the influence of law, whether domestic or international.<sup>252</sup> Globalization has spawned economic activity in contexts where business enterprises are not, and perhaps cannot be, made legally accountable for both intentional and unintentional violations of

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<sup>243</sup> Wesley Cragg, *Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework*, 22 BUS. ETHICS Q. 9, 11 (2012).

<sup>244</sup> See *id.*

<sup>245</sup> *Id.* at 12.

<sup>246</sup> *Id.*

<sup>247</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 17–26.

<sup>248</sup> *Id.* ¶ 3.

<sup>249</sup> *Id.* ¶ 27.

<sup>250</sup> See *Further Steps*, *supra* note 202, ¶ 87.

<sup>251</sup> See generally *Protect, Respect and Remedy*, *supra* note 29 (outlining the framework).

<sup>252</sup> See *Towards Operationalizing*, *supra* note 200, ¶ 66; *Protect, Respect and Remedy*, *supra* note 29, ¶ 3.

human rights along with their attendant harms.<sup>253</sup> As a result of the governance (or rather governmental) gap, a juridical vacuum is formed.<sup>254</sup> This vacuum becomes a breeding ground for human rights abuses and, hence, stands in need of closure, presumably by means of legal instrumentalities.<sup>255</sup>

The second justificatory component is the duty of governments “to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction.”<sup>256</sup> This state obligation to provide protection is a maxim that resides “at the very core of the international human rights regime.”<sup>257</sup> The justification for that maxim as a genuine legal principle is assumed by the report, which it takes to establish legal obligations or duties.<sup>258</sup>

The third component is the view that the core human rights responsibility of corporations is to respect human rights.<sup>259</sup> This responsibility extends into the gaps that have emerged during globalization that resulted in a human rights law void.<sup>260</sup> It follows that the corporate responsibility to respect human rights applies even in situations and settings where the law does not require compliance.<sup>261</sup>

This being the case, the proposed “responsibility to respect” cannot be a legally grounded obligation and must be justified by reference to some kind of extra-legal standard.<sup>262</sup> Seemingly, that standard is the social expectation referenced as “a company’s social license to operate.”<sup>263</sup> Failure to live up to this social expectation may “subject companies to the courts of public opinion . . . and occasionally to charges in actual courts.”<sup>264</sup> In other words, the failure to respect human rights can create risks that may impact operations and damage a company’s reputation, perhaps its most valuable intangible asset.<sup>265</sup>

All told, the justificatory foundation of Ruggie’s report is instrumental and pragmatic. More specifically, it relies upon the law and economics lodestar of economic efficiency which, in regard to the firm,

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<sup>253</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 34.

<sup>254</sup> See *id.* ¶¶ 88–91.

<sup>255</sup> See *id.*

<sup>256</sup> *Id.* ¶ 18.

<sup>257</sup> *Id.* ¶ 9.

<sup>258</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 9.

<sup>259</sup> See *id.* ¶ 24.

<sup>260</sup> See *Further Steps*, *supra* note 202, ¶ 66; Cragg, *supra* note 243, at 12.

<sup>261</sup> See *id.*

<sup>262</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 23.

<sup>263</sup> See *id.*

<sup>264</sup> *Id.* ¶ 54.

<sup>265</sup> See *id.* ¶ 22.

amounts to the objective of profit maximization.<sup>266</sup> Yet, is this instrumental rationale an adequate justificatory foundation on which to build a corporate responsibility to respect human rights? It is clear that reputational and more direct financial risks associated with unethical conduct and human rights abuses compel some multinational corporations and industry associations to commit publicly to respecting human rights even where not required by law.<sup>267</sup> Nevertheless, it is equally clear that profit maximization is not a compelling reason to respect human rights in many of the markets in which multinational and domestic corporations are active.<sup>268</sup>

In many parts of the world, respect for human rights, along the lines promulgated in international standard-setting documents like the Universal Declaration of Human Rights, is not consistent with local custom, and is therefore not something that the public would necessarily even expect to emanate from business enterprises.<sup>269</sup> Where this is the case, profit maximization will not necessarily lead to voluntary respect for human rights, where maximizing profits is understood to require downplaying human rights if not ignoring them altogether.<sup>270</sup> Further, where respect for human rights is not a cultural expectation, any risk posed by the failure of corporations to respect fundamental moral principles implicitly embedded in a “social license to operate” will be a hidden risk that can only emerge down the road, if or when human rights values surface to shape public expectations about the standards that should have been respected in past transactions, but were not.<sup>271</sup>

In response, one may argue that even where local ethical custom does not support, and alternatively may resist, efforts to protect human rights, international public opinion and the risk of being shamed by international NGOs for failing to respect human rights may create risks that impact corporate behavior.<sup>272</sup> Without question, international public opinion and the actions of high-profile NGOs have had that effect.<sup>273</sup> According to one scholar, however, international public opinion does not always play that role and cannot always be relied upon.<sup>274</sup>

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<sup>266</sup> See *Further Steps*, *supra* note 202, ¶ 76.

<sup>267</sup> See *Towards Operationalizing*, *supra* note 200, ¶¶ 61–64.

<sup>268</sup> Cragg, *supra* note 243, at 14.

<sup>269</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶¶ 46–48.

<sup>270</sup> See Cragg, *supra* note 243, at 14.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*; Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q. 371, 383 (2010).

<sup>273</sup> See Arnold, *supra* note 272, at 383.

<sup>274</sup> See *id.*

From the perspective of the state, similar problems emerge.<sup>275</sup> The problem of persuading governments to fulfill their legal responsibilities may seem less critical compared to corporations, but under conditions of globalization this assumption may be overly optimistic.<sup>276</sup> As Ruggie noted, international law imposes a duty on states to protect human rights.<sup>277</sup> Nevertheless, state governments' adherence to international law is itself largely voluntary.<sup>278</sup>

Moreover, although some scholars maintain that states largely do respect their international law obligations, Ruggie's report suggests that this is not always the case with respect to human rights.<sup>279</sup> Further, Ruggie asserts that the pressures of globalization on state governments militate against fulfilling their duty to safeguard human rights.<sup>280</sup>

This analysis does not suggest, however, that Ruggie's pragmatist-based framework is of little value.<sup>281</sup> As one scholar noted, "the recommendations offered would without question strengthen respect for human rights globally if they were widely endorsed and acted upon."<sup>282</sup> The problem stems from the law and economics justificatory foundations on which the report rests, which undercuts the coherence and practical persuasiveness of its recommendations.<sup>283</sup> All told, there is little reason to believe that profit maximization provides an adequate or persuasive justificatory foundation on which to rest the proposed framework.

### C. *Legal Naturalism (Normative and Non-Instrumental View of Law)*

The positivist and pragmatist perspectives neglect to provide a deep justification for any moral obligation on the part of international agents to comply with global governance regimes.<sup>284</sup> As this Article previously demonstrated, this is particularly problematic in regard to universal standards such as human rights.<sup>285</sup> Legal naturalism, in contrast to positivism and pragmatism, rests upon the idea that there are rights that humans possess from their nature as rational beings, and that all

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<sup>275</sup> Cragg, *supra* note 243, at 14.

<sup>276</sup> *Id.*

<sup>277</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 9.

<sup>278</sup> Cragg, *supra* note 243, at 14.

<sup>279</sup> See *id.*

<sup>280</sup> See *id.*; *Protect, Respect and Remedy*, *supra* note 29, ¶ 10.

<sup>281</sup> Cragg, *supra* note 243, at 14.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See *supra* Part II.A.4–B.2.

<sup>285</sup> See *supra* text accompanying notes 140–143, 267–271.

rational beings are entitled to be treated as ends in themselves and not merely as a means.<sup>286</sup>

This section begins by discussing an influential contemporary version of legal naturalism: Ronald Dworkin's model of law-as-integrity as set forth in his book *Law's Empire*. Indeed, with respect to international relations, such a conception of "law's empire" seems to anticipate the development of regimes of human rights and international law that point to an order of legitimate international and cosmopolitan law.<sup>287</sup> Dworkin has framed his theory as an alternative to positivism and pragmatism, both of which could be taken as theoretical progenitors of the polar opposite—"empire's law."<sup>288</sup> It is "empire's law" that imperils any naturalistic cosmopolitan vision with mobilizations of military, economic, cultural, and political power, deployed under the guise of legitimate coercive legal actions, yet dictated by the instrumental aims of power players across the globe.<sup>289</sup> Accordingly, we shall consider to what extent a "law's empire" (or law-as-integrity) approach might provide justificatory support for global economic governance regimes. Following that, the section turns to considering ideas from traditional natural law theory that establish congruence between rule of law, human rights, and global economic governance.

### 1. *Law's Empire*: The Law-as-Integrity Conception of Law

Dworkin demonstrates the incapacity of positivism and pragmatism to account for common law reasoning.<sup>290</sup> Positivists, Dworkin asserts, attempt to singularize law from social custom with the assistance of a "master rule."<sup>291</sup> Any problems in ascertaining what the law is when applying it are considered questions of judicial discretion.<sup>292</sup> According to positivism, legal obligation can exist only where some settled and

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<sup>286</sup> See R. George Wright, *Treating Persons as Ends in Themselves: The Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 271–72 (2002). This is a Kantian way of justifying natural rights. *Id.* Other justifications, some of them theological in nature, can also be provided, as is discussed in more detail below.

<sup>287</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 34 (1986).

<sup>288</sup> See *id.* at 34–35.

<sup>289</sup> See generally DAVID HARVEY, *THE NEW IMPERIALISM* (2003) ("look[ing] at the current condition of global capitalism and the role that a 'new' imperialism might be playing within it"); Leo Pantich & Sam Gindin, *Theorizing American Empire*, in *EMPIRE'S LAW* 21 (Amy Bartholomew ed., 2006) (discussing American imperialism); Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFF., no. 3, 2004 at 1 (discussing attempts to theorize the new world order).

<sup>290</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 39–43 (1978).

<sup>291</sup> See *id.*

<sup>292</sup> See *id.* at 81.

empirically verifiable rule establishes that obligation.<sup>293</sup> In other words, positivists characterize law as a command system whose only constraint is the requirement that it maintain internal consistency.<sup>294</sup> In Dworkin's view, that position is wrong.<sup>295</sup> The existence of some master rule constitutes neither a necessary nor a sufficient condition for a legal system.<sup>296</sup> One can see it is not necessary because law can arise, as it does in the common law, through judicial decision-making.<sup>297</sup> One observes that it is not sufficient because in applying the law, judges incorporate general principles that are not strictly derivable from any specific rules, but instead carry "gravitational force."<sup>298</sup>

Such general principles of law need to be invoked especially in "hard cases" where judges must declare the rights and duties of the parties without the benefit of any clear precedent that dictates a resolution.<sup>299</sup> In doing so, Dworkin argues that judges are not exercising discretion in any "strong" sense; to do so would undermine the rule of law by, in effect, operating as a form of retroactive legislation, and also violate the principle of separation of powers that reserves law creation to the legislative branch. Rather, they are exercising discretion in only a "weak" sense by selecting the best principled justification for a ruling that declares the pre-existing rights and duties of the parties.<sup>300</sup>

Pragmatists, in contrast, by treating law as a means for achieving instrumental goals, end up licensing interpretations of rights, not according to independent and pre-existing legal material, but instead by the extra-legal and ultimately discretionary use of whatever best promotes the political agenda or interests of the judge.<sup>301</sup> Yet, that contradicts the idea that rights are essentially counter-utilitarian; that is, rights serve as "trumps" against collective goals.<sup>302</sup>

Regarding the concept of law, Dworkin understands law as the scheme of rights and responsibilities that licenses either the deployment or withholding of collective force, where such force is construed as governmental coercion on behalf of a single nation-state.<sup>303</sup> Examin-

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<sup>293</sup> See *id.* at 17.

<sup>294</sup> See *id.* at 20–21.

<sup>295</sup> See *id.* at 22.

<sup>296</sup> See DWORKIN, *supra* note 290, at 22–28.

<sup>297</sup> See *id.* at 31–39.

<sup>298</sup> *Id.* at 111–21.

<sup>299</sup> See *id.* at 81.

<sup>300</sup> See *id.* at 31–32.

<sup>301</sup> See *id.* at 97–99.

<sup>302</sup> DWORKIN, *supra* note 287, at 160.

<sup>303</sup> See *id.* at 108–10.

ing this concept—which is narrowly tailored to fit a domestic legal order such as that of the United States especially—with reference to the wider context of soft law yields some interesting observations.<sup>304</sup> Dworkin did not intend to propose a theory for international law, much less for soft law.<sup>305</sup> Nevertheless, the strong normative features of his theory provide at least a starting point for a cosmopolitan jurisprudence grounded in rule of law and human rights.<sup>306</sup> With this in mind, one may single out the single-state-centered aspects of Dworkin’s theory which, while intended to justify domestic state law, prove insufficient for a cosmopolitan jurisprudence inclusive of soft law.<sup>307</sup> Thus, Dworkin’s formulation of the concept of law: (i) binds the concept of law to the separate concept of coercion, in particular state coercion; and (ii) overly restricts that concept to the rights and responsibilities of single-nation communities.<sup>308</sup>

Many authoritative interpretations of soft law initiatives do not directly involve the legitimation or constraint of *state* coercion, because their addressees include other actors such as corporations, IGOs, and NGOs.<sup>309</sup> Accordingly, Dworkin’s canonical expression of the concept of law is too narrow to capture what is “law-like” in global governance regimes of civil regulations.<sup>310</sup> The initiatives are indeed law-like in that they are formulated as written norms, using legal forms of ordering such as contract, legislation, managerial direction, dialogue, and voting; they are intended as laying down policies, principles and standards; further, they are “enforced” with informal reputational “sanctions,” and they serve to deploy and also restrain power and influence.<sup>311</sup>

I suggest a modified formulation of the concept of law as the principled justification establishing the legitimacy of authoritative conduct: policymaking, decision-making, and action (or forbearance) on behalf of global economic and political actors. In an abstract sense, law consists of justifying theories of standards for authoritative conduct, which may or may not ever be manifested as deployments of political force or

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<sup>304</sup> See *id.* at 111–13.

<sup>305</sup> Cf. DWORKIN, *supra* note 290, at vii–viii (framing an acceptable “general theory of law” in terms of state and familiar domestic institutions).

<sup>306</sup> See *id.* at 184–86.

<sup>307</sup> See *id.* at 184–85.

<sup>308</sup> See *id.* at 184–89.

<sup>309</sup> JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 90–97 (2004).

<sup>310</sup> See DWORKIN, *supra* note 290, at 184–85.

<sup>311</sup> Kevin Jackson, *Natural Law, Human Rights and Corporate Reputational Capital in Global Governance*, 8 CORP. GOVERNANCE 440, 440–45 (2008).



coercion as such.<sup>312</sup> Even in the context of domestic and international “hard” law, legal norms are constituted, interpreted, applied in particular cases, and obeyed on a regular basis without employing coercive mechanisms, such as sanctions (e.g., fines, incarcerations, payment of damages).<sup>313</sup> The logical connection between coercive force and law is a contingent, not a necessary one.<sup>314</sup>

This account of the concept of law better explains why the effective institution of and regular compliance with legal norms need not involve essential reference to official state sanctions or governmental force at all.<sup>315</sup> Moreover, the revised account lends greater cogency both to the notion of soft law as a primary form or exemplar of law and to non-positivistic, non-instrumental conceptions of law, such as those advanced in the natural law tradition.<sup>316</sup>

The spirit of this account is analogous to, yet the inverse of, what Kelsen had in mind by his “pure” theory of law. Kelsen sought to provide an empirical account of the nature of law, which he took to be a system of coercive norms, apart from what he saw as a separate and non-empirical phenomenon of a philosophy of justice.<sup>317</sup> Yet, precisely the opposite is the case. A philosophy of justice, or a theory of rights, is integral, not accessory, to law and rule of law.<sup>318</sup> After all, it is the demand of justice that arbitrary power be properly restrained, and that legal authority be legitimate. Further, whereas coercion is no doubt a prominent and highly visible means of ensuring compliance with justified legal norms, it is in no way either the exclusive or the necessary method that law provides for preserving and expanding its reach either within a national community, between national communities, or on behalf of the world community.<sup>319</sup>

It is instructive to examine the following discussion of the concept of law Dworkin posits:

Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they

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<sup>312</sup> See, e.g., *supra* notes 89–104 and accompanying text (explaining Kelsen’s Pure Theory of Law); *supra* notes 105–117 and accompanying text (explaining Hart’s Rule of Recognition Theory).

<sup>313</sup> See Jackson, *supra* note 311, at 444.

<sup>314</sup> See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 277 (2011).

<sup>315</sup> See *id.*

<sup>316</sup> See *id.*

<sup>317</sup> See *supra* text accompanying notes 89–104.

<sup>318</sup> See DWORKIN, *supra* note 287, at 97–98.

<sup>319</sup> See *id.* at 191–92.

also aim to remain in power. They use the collective force they monopolize to these and other ends. Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore “legal” rights and responsibilities.<sup>320</sup>

As illuminating as this formulation may be for capturing essential features of domestic law, such an account—which explicitly identifies law with rights and responsibilities that “license coercion”—is misleading and under-inclusive regarding global soft law civil regulations.<sup>321</sup> It is misleading because it suggests that law is concerned only with *state* power having specific manifestation as *coercion*.<sup>322</sup> In fact, much international political power is wielded, not as outright coercion, but also as “soft power” in Joseph Nye’s sense.<sup>323</sup> It is under-inclusive because it effectively leaves out not only international soft law but also hard law, neither of which are established by a single domestic community but rather by a multiplicity of overlapping communities.<sup>324</sup>

Law concerns the ordering and legitimation by rule of law of many variant social, moral, and economic relations in a community, not just deployments (and suppressions) of political force *qua* coercion.<sup>325</sup> Dworkin’s conception of law lays stress on the interpretive dimension of law.<sup>326</sup> Throughout *Law’s Empire*, the nature of legal interpretation is represented as a “constructive” undertaking similar to literary and artis-

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<sup>320</sup> *Id.* at 93.

<sup>321</sup> *Id.*; see NYE, *supra* note 309, at 5.

<sup>322</sup> See NYE, *supra* note 309, at 5.

<sup>323</sup> See *id.* “Soft power” is portrayed by Nye as “the ability to shape the preferences of others.” *Id.*

<sup>324</sup> See *id.* at 73.

<sup>325</sup> See DWORKIN, *supra* note 287, at 110–11.

<sup>326</sup> See *id.* at 49–68.

tic interpretation.<sup>327</sup> One may ask why Dworkin includes the coercion element in the concept of law at all. At least part of the reason is concern for a kind of “intellectual stare decisis”—an effort to follow the tendency of modern theories of jurisprudence to stress the connection between law and force.<sup>328</sup> After all, the liberal ideal of rule of law involves the notion that law is a constraint on the exercise of political power.<sup>329</sup> While the rule of law may embody control on the exercise of power as an important function of law (it has been historically significant, especially since the Old Regime), it is not obviously true that this is either the defining or the most salient characteristic of law itself.<sup>330</sup>

Of course, Dworkin’s formulation of the concept of law departs from positivist conceptions in many important respects.<sup>331</sup> For instance, Dworkin’s understanding of legal obligation as a genre of associative obligations, and his statement of the “rights thesis” originally set out in *Taking Rights Seriously* is at odds with Austin’s “command thesis,” Hart’s “internal point of view” hypothesis, and Kelsen’s “coercive system of norms” account.<sup>332</sup>

In support of Dworkin’s effort, it may be said that this is what we want from a concept of law: an “umbrella” idea that allows important theories of law to share at least something in common, in this case, the law-as-legitimate-coercion notion.<sup>333</sup> That might be a worthy aim, but unfortunately to come under the positivist’s conceptual tent is to perpetuate the mistake of placing the concept of law on the same plateau as the concept of a national legal system, with reference only to the centralized command mechanisms of the same.<sup>334</sup> It may be—although doubtful—that the concept of a legal system ought to include coercion as an essential element.<sup>335</sup> The fact that most, though not all, legal norms are in principle capable of being backed up by the deployment of state force (for example, garnishment procedures or imprisonment), or that some norms require that the state not exercise its force in spe-

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<sup>327</sup> *Id.* at 52.

<sup>328</sup> Davesims, Comment to *Train Philosophers with Pearl and Kahneman, not Plato and Kant*, HACKER NEWS, <http://news.ycombinator.com/item?id=4891502> (last visited Mar. 5, 2013); see DWORKIN, *supra* note 287, at 110–11.

<sup>329</sup> See DWORKIN, *supra* note 287, at 110–11.

<sup>330</sup> See Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 5 (1990).

<sup>331</sup> See DWORKIN, *supra* note 290, at 18–22.

<sup>332</sup> See *id.* at 18.

<sup>333</sup> See *id.* at 46–47.

<sup>334</sup> See *id.* at 22.

<sup>335</sup> See Hurd, *supra* note 68, at 400.

cific areas (for instance, the establishment clause or constraints on privacy invasion), tends to underscore the gravity of the authoritative decision-making process.<sup>336</sup> Citizens do often have a lot at stake in legal outcomes. But the measure of practical importance of official state conduct manifested as coercive force is ancillary to the deeper question of legitimacy.<sup>337</sup> Moreover, in the context of global economic governance, not all material authoritative conduct standing in need of justification and restraint is expressed, or even expressible, as coercive force.<sup>338</sup>

One may argue that Dworkin's formulation could be immunized from this critique if we stipulate that whatever a government does pursuant to law, whether it be policymaking, decision-making, or symbolic display, *et cetera*, is by definition either an exercise or withholding of the sort of "collective force" to which he alludes in the above excerpt.<sup>339</sup> The problem with this line of thought is that the "force" of law (scheme of rights and responsibilities) behind governmental conduct is much broader than the "license for coercion" that Dworkin depicts.<sup>340</sup>

The force of law is ultimately authoritative force, yet it is highly nuanced.<sup>341</sup> It encompasses not only brute and physical forms of coercion (physical and economic sanction), but also complex forms of moral and psychological sanctions, as well as positive incentives and rewards.<sup>342</sup> Law is often as effective through persuasive, symbolic, and recommendatory modes as through coercive modes, though admittedly the former tend to attract less publicity than the latter.<sup>343</sup> It should also be noted that forms of coercion operable in legal contexts (whether domestic or international, and whether soft or hard) are themselves often instrumentalities, not ends in themselves aimed at attracting voluntary peaceable compliance with norms and at promoting an attitude of respect for legitimate authority.<sup>344</sup>

Another possible explanation for Dworkin's inclusion of the power element in the concept of law relates to the parochial nature of this theoretical focus. Dworkin's theory of law is at heart a theory of U.S.

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<sup>336</sup> See DWORKIN, *supra* note 287, at 93.

<sup>337</sup> See MARCEL M.T.A. BRUS, THIRD PARTY DISPUTE SETTLEMENT IN AN INTERDEPENDENT WORLD: DEVELOPING A THEORETICAL FRAMEWORK 122 (1995).

<sup>338</sup> See *supra* notes 31–33 and accompanying text.

<sup>339</sup> See DWORKIN, *supra* note 287, at 93; *supra* text accompanying note 320.

<sup>340</sup> Cf. NYE, *supra* note 309, at 5–10 (explaining the nuances of power).

<sup>341</sup> See *id.*

<sup>342</sup> See *id.*

<sup>343</sup> See *id.*

<sup>344</sup> See *id.*

and British law.<sup>345</sup> Yet, it is not clear why the law of those two countries—or for that matter national law in general—ought to be considered paradigmatic of the concept of law.<sup>346</sup> This point is especially vital given the displacement of the state alongside of other actors in global governance syndicates.<sup>347</sup>

Because soft law and hard international law are law too,<sup>348</sup> they ought to come within the purview of an abstract portrayal of the concept of law.<sup>349</sup> Nonetheless, these two important varieties of law fall largely outside the scope of Dworkin's formulation due to the narrow "license for coercion" wording he employs.<sup>350</sup>

The idea of law as a form of formal coercion implies that enforcement mechanisms are a key ingredient in any recipe for legal standards.<sup>351</sup> Yet, the comparatively less enforceable (and less enforced) character of international norms does not diminish their legal status.<sup>352</sup> Legal positivists such as Austin, Hart, and Kelsen misleadingly portray domestic legal systems as paradigmatic of the concept of law.<sup>353</sup> The result is that such theories tend to take exaggerated stances on the legal status of international law, including global civil regulations and human rights standards.<sup>354</sup>

A survey of the various types of voluntary civil regulations in global economic governance regimes reveals that they do not involve any essential connection to coercion or enforcement.<sup>355</sup> Yet ultimately, enforcement is problematic even for domestic law.<sup>356</sup> For instance, it is

<sup>345</sup> See DWORKIN, *supra* note 290, at 46.

<sup>346</sup> See KEVIN. T. JACKSON, CHARTING GLOBAL RESPONSIBILITIES: LEGAL PHILOSOPHY AND HUMAN RIGHTS 72 (1994).

<sup>347</sup> See JONATHAN HAVERCROFT, CAPTIVES OF SOVEREIGNTY 48 (2011).

<sup>348</sup> See Kelsen, *supra* note 89, at 320 ("[I]nternational law is 'law,' if it is a coercive order . . .").

<sup>349</sup> See GENNADI MIKHALOVICH DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 20 (1993).

<sup>350</sup> See DWORKIN, *supra* note 287, at 93.

<sup>351</sup> Cf. Ronald C. Kramer & David Kauzlarich, *Nuclear Weapons, International Law, and the Normalization of State Crime*, in STATE CRIME: CURRENT PERSPECTIVES 68, 90 (Dawn L. Rothe & Christopher W. Mullins eds., 2011) (arguing that the lack of formal enforcement mechanisms led to blatant state disregard for the principle of noncombatant immunity during World War II).

<sup>352</sup> See Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 447 (2006).

<sup>353</sup> See SANDRA L. BUNN-LIVINGSTONE, JURICULTURAL PLURALISM VIS-À-VIS TREATY LAW 66–68 (2002).

<sup>354</sup> See *id.*

<sup>355</sup> See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1829 (2002).

<sup>356</sup> See *id.*

hard to see how a judgment for a private citizen against the U.S. government under the Federal Tort Claims Act could be enforced if the government opted not to comply with the court order.<sup>357</sup> Moreover, a good deal of what we normally call law concerns the nonviolent background facilitation of private arrangements such as commercial investments, contracts, powers of attorney, wills, negotiable instruments, and the like.<sup>358</sup> These sorts of legal arrangements are governed by rules and principles complied with because they are either seen to impose genuine obligations or to produce mutually beneficial outcomes for affected parties, not out of a sense of being coerced by power-wielding officials.<sup>359</sup>

Another objection might doubt that my references to international law are fair, since Dworkin's focus is exclusively on American and British law. Accordingly, one might think that such domestic legal systems provide the most apt paradigms for the concept of law. The concept of international law, the argument would go, is but a weak facsimile of the concept of domestic law. But that would be a bad argument because it assumes a primacy for national law with no supporting rationale. The question of which is more basic—national or international law—reflects a deep interpretive issue.

Kelsen expressed this conceptual problem through a distinction between “pluralistic” and “monistic” construals of international law.<sup>360</sup> The former view holds that international law and national law are distinct and mutually independent orders regulating different subject matters and having separate sources (basic norms).<sup>361</sup> The latter view, however, deems the international legal order as itself authorizing various spheres of validity of national orders—and by extension, we might add, soft law civil regulation regimes as well.<sup>362</sup> For Kelsen, one embraces the monistic hypothesis (as a “free” matter of values and attitudes) if one intends to interpret international social, economic, and political relations as genuine legal relations.<sup>363</sup>

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<sup>357</sup> See D'Amato, *supra* note 121, at 1293–94. See generally 28 U.S.C. § 2674 (2011) (stating basic grounds for U.S. government liability to private citizens in tort).

<sup>358</sup> See A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POLI. ECON. 261, 261–62 (1997).

<sup>359</sup> See *id.*

<sup>360</sup> See Kelsen, *supra* note 89, at 328–44.

<sup>361</sup> See *id.*

<sup>362</sup> See *id.*

<sup>363</sup> See *id.*

## 2. Summary of Points

We may summarize a number of points in light of the application of jurisprudential paradigms to the global economic governance context:

- Positivism misconstrues the nature of international soft law norms (civil regulations and human rights) as an exclusively factual matter, which runs afoul of the is-ought distinction.<sup>364</sup> Descriptive “is’s” which are constitutive of facts, do not amount to the same thing as prescriptive “oughts,” which are constitutive of values and moral judgments.<sup>365</sup>
- Pragmatism (instrumental theories such as law and economics, legal realism, and CLS) misconstrues soft law norms as fictions (“as if” assertions) constructed to serve ideological, political, and economic objectives, not as non-instrumental standards (for example, trumps over a community’s goals that are legitimated on grounds of principle).<sup>366</sup>
- As a naturalistic account, the law-as-integrity approach carries the advantage of presenting a non-instrumental normative theory of law that avoids the descriptive and instrumental deficiencies of positivism and pragmatism.<sup>367</sup> Accordingly, it moves closer in the direction of assimilating legal reasoning to moral reasoning than positivist and pragmatist models, providing an alternative to the discretionism that otherwise threatens to undermine the rule of law.<sup>368</sup>
- Nevertheless, law-as-integrity has the following deficiencies that inhibit its serviceability as a jurisprudential model for global governance: (1) the theory restricts its non-instrumental conception of law to the domestic sphere,<sup>369</sup> failing to provide any support for a conception of an idealized “associative” international community; (2) the theory ties the concept of law to state coercion, but global governance is characterized by a diminution of state authority and by motivations for compliance that are non-coercive in nature;<sup>370</sup>

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<sup>364</sup> See *supra* Part II.A.4.

<sup>365</sup> See *supra* Part II.A.4.

<sup>366</sup> See *supra* Part II.B.

<sup>367</sup> See *supra* Part II.C.1.

<sup>368</sup> See *supra* Part II.C.1.

<sup>369</sup> It should also be mentioned that Dworkin’s theory tends to dwell on the judicial dimensions of law, as in its special concern for “hard cases.” See DWORKIN, *supra* note 290, at 81–130.

<sup>370</sup> See *supra* text accompanying notes 303, 305–308.

(3) the theory, while asserting a rigorous conception of contractarian-based civil rights of the sort enjoyed by members of advanced democratic political communities, fails to offer an account of universal natural human rights that would reflect the normative status of a global citizenry;<sup>371</sup> (4) the theory gives no account of the interplay between law-obedience and virtue, which is vital given the need for internal motivation to follow soft law, and given the fact that reputation-based judgments (informal “sanctions” constituting the “rule of reputation” and sense of legitimacy) presuppose virtue and character (or the lack thereof) on the part of economic participants.<sup>372</sup>

### 3. Natural Law Theory

Natural law theory, in contrast to positivism and pragmatism, sees law as essentially connected to human nature, and therefore as universal.<sup>373</sup> According to natural law theory, morality is in turn tied to our human nature as rational beings.<sup>374</sup> Thus, since reason can discover valid moral principles by examining the nature of humanity in society, the content of human-made positive law cannot gain legitimacy except by way of some reference to natural law.<sup>375</sup> Seen in this way, natural law provides a deeper standpoint from which to criticize law itself.

#### a. *Deeper Foundation for Human Rights*

One might agree that human rights standards exist as written norms, containing expressions of international policy, and yet wonder why we cannot—as positivists and pragmatists would be inclined to do—simply speak of governments, institutions and corporations respecting, promoting, and protecting them (or violating them as the case may be).<sup>376</sup> What difference does it make whether there is some

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<sup>371</sup> See *supra* text accompanying notes 303–311.

<sup>372</sup> See *supra* text accompanying notes 303–311.

<sup>373</sup> See Kevin F. Ryan, *Lex et Ratio: We Hold These Truths*, 31 VT. B.J., no. 4, 2006 at 9, 12.

<sup>374</sup> See *id.*

<sup>375</sup> See *id.*

<sup>376</sup> See Ken Booth, *Three Tyrannies*, in HUMAN RIGHTS IN GLOBAL POLITICS 31, 58–59 (Tim Dunne & Nicholas J. Wheeler eds., 1999) (“All states regularly proclaim their acceptance of and adherence to international human rights norms—notably the 1948 Universal Declaration of Human Rights—and charges of human rights violations are among the strongest that can be made in international relations. Even abusers of human rights feel



more fundamental moral law behind the posited written rules and the policies they embody? What needs to be shown is not simply that business enterprises, states, and the people belonging to them should respect human rights and other institutionally sponsored global imperatives as a matter of custom or habit, or to meet social expectations, or to avoid sanctions, or to fulfill some function. Rather, they all must be shown to stand under a more fundamental law—what Kant and others term “the moral law”—that gives normative legitimacy to, and also constrains the discretion of global actors in observance of, the rule of law for global economic governance.<sup>377</sup>

We can understand the rule of law that underwrites global economic governance not as a fixed repository of knowledge we possess of the normative features of our world, but rather as a means for giving answers to legal and moral questions that are embedded within global governance initiatives.<sup>378</sup> Otherwise stated, there are moral facts and truths that exist separate from procedures, which the procedures are oriented to pursue.<sup>379</sup>

This amounts to something like the process Aristotle calls dialectic and John Rawls terms “reflective equilibrium.”<sup>380</sup> One begins with settled views, intending to find principles harmonious with most of them.<sup>381</sup> Then one moves on to give some explanation for those views or to correct them should they prove deficient.<sup>382</sup> Throughout the dialectical process, one will set forth value assertions that express views about what the good life is.<sup>383</sup>

Moral skeptics who would deny the existence or possibility of legality, much less legitimacy, in global economic governance characteristically claim that there can be no pathway guiding us toward genuine

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the need to defend themselves in the currency of the human rights discourse; they do not reject it.”).

<sup>377</sup> See CHRISTINE KORSGAARD, *THE SOURCES OF NORMATIVITY* 29, 99 (1996) (“The very notion of a legitimate authority is already a normative one and cannot be used to answer the normative question.”).

<sup>378</sup> See *id.* at 35 (distinguishing between substantive moral realism and procedural moral realism).

<sup>379</sup> See *id.*

<sup>380</sup> Edwin M. Hartman, *Socratic Questions and Aristotelian Answers: A Virtue-Based Approach to Business Ethics*, 78 J. BUS. ETHICS 313, 320–21 (2008) (examining the dialectical process and relating it to Rawls’s notion of reflective equilibrium).

<sup>381</sup> See *id.*

<sup>382</sup> See *id.*

<sup>383</sup> See *id.*

moral truth.<sup>384</sup> Under such a view, it does not matter what we do or fail to do. This is nihilism: the belief that words like “ought,” “must,” and “should” express conceptual error.<sup>385</sup> We shall test the cogency of this position in a moment. For now, let us turn to the idea of a higher law illuminating the rule of law and human rights, and the role this regulative ideal might assume in a naturalist jurisprudential paradigm for global economic governance.

b. *Legitimacy from Higher Moral Law*

The concept of a law higher than written norms has been recognized from ancient times.<sup>386</sup> Central to the conception of such a higher law is the idea that human dignity surpasses any particular social order as the foundation for moral rights, and can neither be bestowed nor legitimately infringed by society.<sup>387</sup> As such, human dignity forms the conceptual core of human rights, and embraces the intrinsic worth inherent in all human beings.<sup>388</sup> Within the natural law tradition, and in Catholic social thought, the wellspring of human dignity is the concept

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<sup>384</sup> See, e.g., WALTER SINNOTT-ARMSTRONG, *MORAL SKEPTICISMS* 250–51 (2006) (arguing there are no adequate rebuttals to moral nihilism). See generally RICHARD JOYCE, *THE MYTH OF MORALITY* (2001) (asserting that moral discourse is fundamentally flawed); JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977) (denying the existence of objective moral values).

<sup>385</sup> See, e.g., James Dreier, *Moral Relativism and Moral Nihilism*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY* 240, 240 (David Copp ed., 2006) (describing the basis of nihilism).

<sup>386</sup> In Sophocles’ tragedy *Antigone*, the title character refers to a higher law obliging her to bury her rebel brother Polyneices, slain in civil war, against Creon’s ban on burials of insurgents as a sign of their dishonor. SOPHOCLES, *ANTIGONE* 11–12, 25–26 (Nicholas Rudall & Bernard Sahlins eds., Nicholas Rudall trans., Ivan R. Dee 1998) (441 B.C.E.). Regarding these unwritten laws, Antigone declares “They live not in the now or in the yesterday. They live in eternity. They come to us time out of mind.” *Id.* at 26 (lines 454–55).

<sup>387</sup> See WILLIAM EBENSTEIN & ALAN EBENSTEIN, *GREAT POLITICAL THINKERS: PLATO TO THE PRESENT* 144 (2000). A concern for universal human dignity at the heart of the moral law is present in Stoic philosophy, which originated in ancient Greece and later expanded into the Roman Empire. *Id.* Within the rich heritage of Roman jurisprudence that later emerged, Cicero expressed a concept of unwritten moral law of universal legitimacy: “there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.” *Id.* at 138 (quoting CICERO, *DE RE PUBLICA* 211 (Clinton Walker Keyes trans., Harvard Univ. Press 1928) (c. 54 B.C.E.)).

<sup>388</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl. (Dec. 10, 1948) [hereinafter UDHR].

of *imago Dei*, which regards the human person as having been made in the image and likeness of God.<sup>389</sup>

The notion of an unseen higher law rests at the core of modern treatments of rights.<sup>390</sup> For John Locke, even in a state of nature there is a law, embedded in reason, recognized by all people.<sup>391</sup> Such a law of nature engenders natural rights discernible by all rational beings, taken

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<sup>389</sup> See CATECHISM OF THE CATHOLIC CHURCH 91–96; POPE JOHN PAUL II, ENCYCLICAL LETTER: *REDEMPTOR HOMINIS* (1979), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redemptor-hominis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html); POPE JOHN PAUL II, ENCYCLICAL LETTER: *VERITATIS SPLENDOR* 12 (1993), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html); SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM: *DIGNITATIS HUMANA* ¶¶ 2, 9 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html); SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NONCHRISTIAN RELIGIONS: *NOSTRA AETATE* 96 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_nostra-aetate\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html); SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES* ¶¶ 12–24 (1965) [hereinafter *GAUDIUM ET SPES*], available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html); POPE PIUS XII, ENCYCLICAL LETTER: *HUMANI GENERIS* 22–23 (1950), available at [http://www.vatican.va/holy\\_father/pius\\_xii/encyclicals/documents/hf\\_p-xii\\_enc\\_12081950\\_humani-generis\\_en.html](http://www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_12081950_humani-generis_en.html).

<sup>390</sup> Recourse to the idea of higher moral law has been central to many civil rights cases throughout United States history. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (“In framing Title II of [the Civil Rights] Act Congress was . . . dealing with what it considered a moral problem.”). Martin Luther King, Jr.’s famous *Letter from Birmingham Jail* decried the persistence of racial prejudice from extant law:

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal and natural law.

MARTIN LUTHER KING JR., *Letter From a Birmingham Jail*, in *I HAVE A DREAM: WRITINGS & SPEECHES THAT CHANGED THE WORLD* 83, 89 (James M. Washington ed., 1992). According to Aquinas:

Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence . . . . Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is really not a law but rather a corruption of the law.

THOMAS AQUINAS, *SUMMA THEOLOGIAE* 284 (Timothy McDermott ed., Christian Classics 1989) (c. 1265).

<sup>391</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 123 (Thomas I. Cook ed., Hafner Press 1947) (1690).

to be independent of, and prior to, rights instituted by specific political arrangements.<sup>392</sup>

The belief in a higher law for human societies has not been restricted to Western civilization.<sup>393</sup> Not only was such a concept found in ancient China, it was of greater significance than the comparatively weak Chinese counterparts to Western positive law.<sup>394</sup> Arguments supporting the existence of such a law—which encompasses a broad scope of human conduct—appear in canonical philosophical writings from China extending back to the fifth century BC.<sup>395</sup> Confucian thought held that economic, social, and political order was attainable only if people conformed themselves to the ways of Heaven.<sup>396</sup> This invisible order could be known by introspection, meditation, and the investigation of things.<sup>397</sup> Mencius, one of Confucius’s disciples, articulated various kinds of protocols that would enable an economy to flourish “on its own” in the manner of self-actualization, which is accomplished not by positive means but instead by way of inaction, known as *wuwei*.<sup>398</sup>

Within the sphere of international law, the notion of an unwritten law has been vital. For instance, during the Nazi war crimes trials at Nuremberg, jurisdictional limitations precluded prosecuting the crimes pursuant to the laws of the various participating nation-states.<sup>399</sup> Accordingly, the indictments referenced “crimes against humanity.”<sup>400</sup>

One of the most sophisticated proponents of natural law thinking, Thomas Aquinas posited that natural law is that part of the eternal law of the creator that is presented to human reason.<sup>401</sup> Natural law guides our reason through a rational trepidation of the eternal law that mani-

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<sup>392</sup> The notion of natural rights is proclaimed in the United States Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

<sup>393</sup> KEVIN T. JACKSON, *VIRTUOSITY IN BUSINESS: INVISIBLE LAW GUIDING THE INVISIBLE HAND* 155 (2012).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* Other ancient Chinese thinkers, among them Shang Yang (390–338 B.C.E.), who earned the label “legalists,” emphasized keeping the kingdom strong by disciplining the people and ordering the economy by the government with *fa* (normally translated as “law”). See *Lord Shang (died 338 BC)*, <http://www.philosophy.hku.hk/ch/Lord%20Shang.htm> (last visited Feb. 6, 2013).

<sup>399</sup> See Kramer & Kauzlarich, *supra* note 351, at 90.

<sup>400</sup> See *id.*

<sup>401</sup> See AQUINAS, *supra* note 390, at 281.

festes itself as precepts, rules of behavior, or broad principles of natural law.<sup>402</sup> Humans must choose to observe the law of nature through their own free will because we are autonomous beings.<sup>403</sup> Because natural law is a product of unaided reason, human laws are positive laws that are, or should be, derived from natural law.<sup>404</sup>

*c. Derivation and Discernment*

In the tradition of Aquinas, natural law theorists maintain that just positive law is “derived” from natural law.<sup>405</sup> There are, however, two distinct kinds of derivation. “In certain cases, [law] . . . “directly forbids or requires what morality itself forbids or requires.”<sup>406</sup> The way in which the positive law derives from the natural law is analogous to the way conclusions are deduced from premises in the natural sciences or mathematics.<sup>407</sup> Nevertheless, this deductive approach is not possible for other types of positive law.<sup>408</sup> Instead, these positive laws invoke the exercise of the practical intellect that Aquinas termed *determinatio*.<sup>409</sup> To illustrate this idea, Aquinas invokes an analogy examining the activity of an architect, whose design choices are made to satisfy a patron’s needs and tastes within practical extremes.<sup>410</sup>

Like the architect, global economic governance participants maintain similar creative freedom in working from basic practical principles, directing actions toward the advancement and protection of human rights.<sup>411</sup> In doing so, these participants also work to prevent disregard for human rights, and toward concrete schemes of regulation aimed at coordinating conduct to promote the well-being of various economic communities impacted by firms’ activities.<sup>412</sup> The fairness of the distribution of burdens and benefits attending a scheme of regulation is a key consideration for assigning corporate responsibility for human

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<sup>402</sup> See *id.*

<sup>403</sup> See *id.* at 286.

<sup>404</sup> See *id.* at 289.

<sup>405</sup> See Robert P. George, *Natural Law*, 52 AM. J. JURIS. 55, 69 (2007); Jackson, *supra* note 311, at 442.

<sup>406</sup> George, *supra* note 405, at 69.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 69–70.

<sup>411</sup> Jackson, *supra* note 311, at 443; George, *supra* note 405, at 69.

<sup>412</sup> Jackson, *supra* note 311, at 443; George, *supra* note 405, at 69.

rights.<sup>413</sup> Yet, the interests and well-being of each individual person or stakeholder must be taken into account and no single interest may be unfairly or unreasonably favored or disfavored, because on the legal naturalist account, all persons have an inherent equal dignity.<sup>414</sup> The common good, however, is not the utilitarian definition of the best interests of the greatest number; rather, it is the shared good of all.<sup>415</sup>

In his thought, Aquinas also demonstrates concern for a dynamic that, although neglected by legal positivist and legal pragmatist approaches, is of great significance for understanding the legitimacy of global governance: the complex interplay between law and virtue.<sup>416</sup> This is an especially important consideration for global governance because we cannot look to traditional sources of external motivations (sanctions). Instead, there is a pronounced need for some account of the intrinsic motivation to follow soft law.<sup>417</sup> Virtue ethics is the logical place to look for that.

Aquinas expounded and further developed Aristotle's virtue ethics.<sup>418</sup> Both thinkers held that human well-being is necessarily related to a person's purpose or end.<sup>419</sup> Aquinas, however, contributed the notion of a supernatural end to Aristotle's naturalistic conception, according to which one attains virtue and *eudaimonia* through the fulfillment of one's natural capacities.<sup>420</sup> For Aquinas, human nature alone does not em-

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<sup>413</sup> See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 116–17 (R. Edward Freeman ed., 1989); George Brenkert, *Can We Afford International Human Rights?*, 11 J. BUS. ETHICS 515, 515 (1992); Kevin T. Jackson, *Global Distributive Justice and the Corporate Duty to Aid*, 12 J. BUS. ETHICS 547, 549 (1993).

<sup>414</sup> Brenkert, *supra* note 413, at 519; Jackson, *supra* note 413, at 549–50.

<sup>415</sup> Manuel Velasquez et al., *Thinking Ethically: A Framework for Moral Decision Making*, ISSUES ETHICS, Winter 1996, at 2, 4.

<sup>416</sup> See AQUINAS, *supra* note 390, at 299; EBENSTEIN & EBENSTEIN, *supra* note 387, at 226; J. Caleb Rackley, Comment, *Legal Ethics in Capital Cases: Looking for Virtue in Roberts v. Dretke and Assessing the Ethical Implications of the Death Row Volunteer*, 36 ST. MARY'S L.J. 1119, 1123–24 (2005) (“Under the principles of natural law, of which Aquinas was so fond, virtue and law are naturally linked because the law is ‘nothing more than reason’s rule and measure of human activity,’ and reason is the means for all virtuous activity.”) (quoting CHARLES P. NEMETH, *AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT* 59–60 (2001)).

<sup>417</sup> Cf. Oren Perez et al., *The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior*, 43 L. & SOC’Y REV. 593, 619–24 (2009) (providing empirical support for impact of employees’ willingness to undertake pro-environmental conduct).

<sup>418</sup> See EBENSTEIN & EBENSTEIN, *supra* note 387, at 224.

<sup>419</sup> See *id.*

<sup>420</sup> See *id.*; *Aristotle’s Ethics*, STAN. ENCYCLOPEDIA PHIL. (Mar. 29, 2010), <http://plato.stanford.edu/entries/aristotle-ethics/> (defining “eudaimonia” as “happiness”).

body its own aspirations.<sup>421</sup> Accordingly, Aquinas was concerned with both a person's natural end and his supernatural end, rendering Aristotelian ethics incomplete in his conception.<sup>422</sup> Thus, Aquinas held that human perfection is necessarily the work of two societies—one concerned with temporal good and the other with transcendent good.<sup>423</sup>

Recognizing the limits of positive law in producing virtuous people—and for the contemporary global context, this theory applies to virtuous companies as well—Aquinas taught that law should not directly mandate the exercise of all the virtues, nor directly prohibit the exercise of every vice.<sup>424</sup> True virtue entails exercising reason and free will to make the right choices.<sup>425</sup> The central practical challenge of an individual's moral life is to decide what to do in the inimitable circumstances in which each distinct person finds himself.<sup>426</sup>

#### d. *Human Well-Being and Economic Governance*

The normative principles connected to fundamental aspects of human well-being guide our practical reason; they inform our moral deliberation about how we should act.<sup>427</sup> Logically speaking, such foundational principles of practical reflection entail norms that lead us to pursue some options, while requiring that we abandon others. How does this approach apply in the global economic governance context of rendering business decisions that involve a competition between self-

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If happiness is activity in accordance with virtue, it is reasonable that it should be in accordance with the highest virtue; and this will be that of the best thing in us. Whether it be reason or something else that is this element which is thought to be our natural ruler and guide and to take thought of things noble and divine, whether it be itself also divine or only the most divine element in us, the activity of this in accordance with its proper virtue will be perfect happiness. That this activity is contemplative we have already said.

ARISTOTLE, *NICOMACHEAN ETHICS* bk. X, ch. 7 (W.D. Ross trans., 1994), <http://classics.mit.edu/Aristotle/nicomachaen.mb.txt>.

<sup>421</sup> See EBENSTEIN & EBENSTEIN, *supra* note 387, at 224.

<sup>422</sup> See *id.*

<sup>423</sup> See *id.* at 226.

<sup>424</sup> See AQUINAS, *supra* note 390, at 291.

<sup>425</sup> See *id.* at 237.

<sup>426</sup> See *id.* at 287.

<sup>427</sup> See Richard C. Ausness, *Risky Business: Liability of Product Sellers Who Offer Safety Devices as Optional Equipment*, 39 HOFSTRA L. REV. 807, 810 (2011) ("The notion of personal autonomy assumes that individuals should have the power to make meaningful choices in their lives without having to justify them to others. This is based on the unique capacity of human beings to reason and to act according to normative principles.").

interested conduct (profit maximization) and conduct consistent with human rights and other standards aimed at the common good?

In its broader sense, “corporate governance” concerns decisions made by a firm’s executives, along with the impact that these decisions have on an array of stakeholders.<sup>428</sup> Accordingly, considering the contemporary context of global economic governance and taking corporate governance in this wider sense, one must include principles that steer economic decision-making toward human well-being and those that demand respect for rights people possess simply by virtue of their humanity (human rights).<sup>429</sup> Let us specify a set of these highly general principles for business enterprises within the context of global economic governance:

- Business enterprises should choose and act in ways compatible with a will toward integral human fulfillment.<sup>430</sup>
- Business enterprises should respect rights people have by virtue of their humanity—human rights.<sup>431</sup>
- The various economic systems at all levels—national, regional, and global—exist to serve humanity, not vice versa; meeting the needs and wants of the human body and spirit is the ultimate purpose of an economic system.<sup>432</sup>
- Justice, virtue and human rights are necessary to check abuses that derive from excessive gain-seeking behavior and other unbalanced business tendencies.

Drawing upon a conception of a higher moral law provides a means of calling attention to objective principles of right action for business.<sup>433</sup> The above list of principles begins with what is, from a logical standpoint, the initial as well as the most abstract moral precept.

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<sup>428</sup> By contrast, the narrower sense of “corporate governance” is limited to actions of a firm’s board of directors, addressing specifically the relationship between a firm and its board.

<sup>429</sup> See JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 147–70 (1987).

<sup>430</sup> See Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 131–33 (1987).

<sup>431</sup> See Tom Campbell, *Moral Dimensions of Human Rights*, in HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS 11, 11–12 (Tom Campbell & Seumas Miller eds., 2004).

<sup>432</sup> See U.S. CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY, at viii (1997), available at [http://www.usccb.org/upload/economic\\_justice\\_for\\_all.pdf](http://www.usccb.org/upload/economic_justice_for_all.pdf) (“The economy should serve people, not the other way around.”).

<sup>433</sup> See JACKSON, *supra* note 393, at 275–83.



This precept asserts that one ought to choose and act in harmony with a will aimed at overall human fulfillment.<sup>434</sup> This is followed by a principle concerning respect for human rights, which—as a corrective to the pragmatist truncation imposed by John Ruggie’s framework—counts businesses as shouldering genuine moral obligations correlative to those rights alongside individuals, NGOs, governments, and any other organizations that can be counted as moral actors.<sup>435</sup>

Some would argue that using human rights language in specifying global economic governance initiatives is unnecessary.<sup>436</sup> But while it may not be absolutely necessary to employ the vocabulary of rights, it seems altogether reasonable and indeed efficacious to do so. We properly speak of an employee’s right not to be discriminated against by her company on the basis of her gender.<sup>437</sup> We can accurately describe a garment subcontractor’s trafficking in human slavery as a violation of human rights.<sup>438</sup> Such moral imperatives are significant human rights that people possess. From whatever communities they are drawn, all individuals are bound to respect these rights, not because of their membership in any particular “visible” domestic or even international legal order (albeit the latter is comparatively less enforceable and less clearly articulated), but rather by virtue of our shared humanity.<sup>439</sup> Of particular importance regarding this shared human status is our nature as rational beings.<sup>440</sup> As Aristotle and other thinkers have endeavored to show, rationality is the nature of human beings.<sup>441</sup> Therefore, it is

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<sup>434</sup> Grisez et al., *supra* note 430, at 99–151.

<sup>435</sup> See UDHR, *supra* note 388, pmbl. (“[E]very individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . .”) (emphasis added).

<sup>436</sup> See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 13–16 (2004) (describing some detrimental qualities of human rights language).

<sup>437</sup> See, e.g., Int’l Labour Organisation [ILO], *Resolutions Adopted by the International Labor Conference at its 98th Session*, at 8–9 (June 2009), [http://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-relconf/documents/meetingdocument/wcms\\_113004.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_113004.pdf) (“Gender equality is a matter of social justice and is anchored in both a rights-based and an economic efficiency approach.”).

<sup>438</sup> See U.N. Convention Against Transnational Organized Crime, G.A. Res. 25/55, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/RES/55/25, at 31 (Jan. 8, 2001).

<sup>439</sup> See James Bacchus, *Groping Towards Grotius: The WTO and the International Rule of Law*, 44 HARV. INT’L L.J. 533, 535 (2003).

<sup>440</sup> See *id.*

<sup>441</sup> See Cecilia Castillo, *Human Rights, Ancient and Modern*, 10 AVE MARIA L. REV. 389, 390–91 (2012).

with regard to our distinctive human nature that we are endowed with a profound, robust, and inherent dignity.<sup>442</sup>

So in a fundamental way, basic moral rights are rights predicated on humans. Also, there exist along with negative duties and their correlative rights, various positive duties for business enterprises, individuals, governments, NGOs, and so forth.<sup>443</sup> Such corresponding moral duties may also be specified and assigned with a vocabulary of rights. In this regard, however, it is necessary to pay special heed, as George Brenkert,<sup>444</sup> Thomas Donaldson and Thomas Dunfee,<sup>445</sup> Henry Shue,<sup>446</sup> James Nickel,<sup>447</sup> Wesley Cragg,<sup>448</sup> Tom Campbell,<sup>449</sup> and many others have, to questions concerning precisely by whom and exactly how any given human right is to be honored.

The conception of human rights advanced here follows from a certain conception of human dignity.<sup>450</sup> According to this view, our natural capacities for reason and the existential freedom that we possess are fundamental to our dignity as human beings.<sup>451</sup> Human rights serve to safeguard and to further advance that dignity. The basic goods of our human nature are the goods that a rational creature enjoys.

We may question whether human beings are really as rational as this account supposes them to be.<sup>452</sup> It is readily apparent that some ends or purposes are intelligible in the sense that they afford a means to other ends. For example, in working to earn money our conduct is rational. After all, money is a valuable means to numerous important ends. No one doubts its instrumental value. Thus, even moral skeptics cannot deny that there are instrumental goods. The question then becomes whether some ends or purposes are intelligible as supplying more than just instrumental justifications for acting. Are there intrinsic,

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<sup>442</sup> Wright, *supra* note 286, at 274–75.

<sup>443</sup> See Stepan Wood, *The Case for Leverage-Based Corporate Human Rights Responsibility*, 22 BUS. ETHICS Q. 63, 65, 89–90 (2012).

<sup>444</sup> See George Brenkert, *Google, Human Rights, and Moral Compromise*, 85 J. BUS. ETHICS 453, 457 (2009).

<sup>445</sup> See THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 16–17 (1999).

<sup>446</sup> See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 5–9 (1980).

<sup>447</sup> See NICKEL, *supra* note 429, at 1–13.

<sup>448</sup> See Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 27 J. BUS. ETHICS 205, 211–13 (2000).

<sup>449</sup> TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION*, at xi–xix (2006).

<sup>450</sup> See J.M. Finnis, *Legal Enforcement of “Duties to Oneself”: Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 439–40 (1987).

<sup>451</sup> See *id.*; Wright, *supra* note 286, at 274–75.

<sup>452</sup> See George, *supra* note 405, at 178.

as well as instrumental, goods? Moral skeptics deny that there are intelligible ends or purposes that make possible rationally motivated behavior.<sup>453</sup> Their opponents assert that aesthetic appreciation, friendship, knowledge, and virtue, along with other purposes or ends carry intrinsic value; they are ends in themselves.<sup>454</sup> Therefore, we cannot reduce them by accounting for their worth solely in terms of non-rational motivational elements like desire and emotions. As basic human goods, they are part-and-parcel of the well-being and fulfillment of both individuals and human communities.<sup>455</sup> Consequently these goods serve as a basis for moral judgment, including our normative interpretations concerning justice and human rights.<sup>456</sup>

Underlying this way of thinking is a realist epistemology.<sup>457</sup> We acquire genuine knowledge of the essence of humankind. Even given obvious variations manifested in different cultures, in different historical contexts, and in different traits, enough similarity exists among humans to reveal an enduring and universal human nature.<sup>458</sup> Nevertheless, it must be granted that some subscribe to worldviews that provide a different account of the human capacities that this Article alleges form a ground for human dignity.<sup>459</sup> Such philosophies give an instrumental and non-cognitivist account of practical reason, and maintain that our experience of deliberation, judgment, and choice is an illusion.<sup>460</sup> David Hume's contention that reason is subservient to the passions and Thomas Hobbes's portrayal of our thoughts as "Scouts and Spies" of our desires are the *loci classici*.<sup>461</sup> If the advocates of these non-cognitivist and subjectivist views of human action are correct, then any project of business ethics would be doomed, and the notion of human dignity would be illusory.

Nevertheless, ethical non-cognitivism and moral subjectivism actually depend upon the very standards of rationality that they seek to at-

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<sup>453</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 73–75 (2d ed. 2011).

<sup>454</sup> See *id.* 81–89.

<sup>455</sup> See *id.*

<sup>456</sup> See *id.*

<sup>457</sup> See Jean Bethke Elshtain, *Law and the Moral Life*, 11 *YALE J.L. & HUMAN.* 383, 384–85 (1999).

<sup>458</sup> See *id.* at 385.

<sup>459</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT'L L.* 655, 679–80 (2008).

<sup>460</sup> See EBENSTEIN & EBENSTEIN, *supra* note 387, at 426.

<sup>461</sup> See *id.* at 426; THOMAS HOBBS, *LEVIATHAN* 139 (C.B. MacPherson ed., Penguin Books 1987) (1651).

tack in constructing their arguments.<sup>462</sup> Certainly, emotion does figure into human action, and sometimes it or other non-rational elements are key motivators.<sup>463</sup> Nevertheless, people can and do properly appeal to reasons for action. As Aristotle demonstrated, these reasons relate to ends that are taken to be aimed at human fulfillment.<sup>464</sup> Moreover, our pursuits of such ends are desired as just that. Stated otherwise, our rational ends have an essential role to play in our motivations.<sup>465</sup>

If all this is true, how do we account for widespread neglect of human rights and other moral principles? One reason is that while we are rational creatures, our rationality is far from perfect.<sup>466</sup> We remain vulnerable to error in moral judgment.<sup>467</sup> Another reason, as Kenneth Goodpaster demonstrates, is that many people in both politics and business are prone to “teleopathy,” a character habit that “values certain limited objectives as supremely action-guiding, to the relative exclusion not only of larger ends, but also of moral considerations about means, obligations, and duties.”<sup>468</sup> To Goodpaster, teleopathy is an unbalanced pursuit of purpose, either directly in decision-making or indirectly in loyalty to some function or role.<sup>469</sup> This fixation on purpose, Goodpaster argues, leads to rationalization, which in turn leads to moral detachment.<sup>470</sup> The result can be unethical conduct which would certainly include neglect for human rights. Consider, as an example, the pursuit of the “war on terror” of the Bush administration that led to disregard for even international legal standards of the Geneva Convention prohibiting torture of terrorist suspects detained at Guantanamo Bay.<sup>471</sup>

If there is a set of moral norms, including norms of justice and human rights that can be known by rational inquiry, understanding, and judgment, even apart from divine revelation, then these norms of unwritten moral law can provide a backdrop for the human rights

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<sup>462</sup> Cf. EBENSTEIN & EBENSTEIN, *supra* note 387, at 426 (depicting Hume’s necessary use of reason to expound his theories).

<sup>463</sup> Cf. *id.* (examining Hume’s theory on passion and reason).

<sup>464</sup> ARISTOTLE, *supra* note 420, bk. I, ch. 9.

<sup>465</sup> See MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 197, 244–45 (1984) (“Rationality is one of the fundamental properties by which we understand ourselves as persons, that is, as creatures capable of adjusting our actions as reasonably efficient means to rational ends.”).

<sup>466</sup> See *id.* at 244–45.

<sup>467</sup> See *id.*

<sup>468</sup> KENNETH E. GOODPASTER, CONSCIENCE AND CORPORATE CULTURE 28 (2007).

<sup>469</sup> See *id.*

<sup>470</sup> See *id.*

<sup>471</sup> Cf. *id.* at 29 (“When teleopathy governs decision-making, the selection of goals and the means chosen to pursue them tends to be myopic.”).

paradigm of global economic governance.<sup>472</sup> Indeed, “[a]s a matter of justice, governments and corporations alike are bound to respect and, to the extent possible (affordable), be proactive in protecting and advancing such rights.”<sup>473</sup>

### III. LEGAL NATURALISM IN THE GLOBAL GOVERNANCE CONTEXT

Seen from the perspectives of both positivist and pragmatist frameworks of jurisprudence, one would approach the task of rendering an account of soft law (global economic governance) by invoking what have respectively come to be known as “The Separation Thesis” and “The Social Thesis.”<sup>474</sup> The separation thesis holds that “there is a conceptual separation between law and morality, that is, between what the law is, and what the law ought to be.”<sup>475</sup> The social thesis “asserts that law is, profoundly, a social phenomenon, and that the conditions of legal validity consist of social—that is, non-normative—facts.”<sup>476</sup>

If viewed from a Dworkinian law-as-integrity frame of reference, these two theses would be rejected, and adopted in their place would be the thesis that law and morality are necessarily connected.<sup>477</sup> Nevertheless, the paradigm developed by Dworkin on its face limits inquiry to domestic regimes, fuses the concept of law to state coercion, and provides no account of human rights.<sup>478</sup>

In the context of shifting views of the role of economic participants in global governance regimes, scholarly treatment and analysis of various soft law initiatives may impact public policy as well as both the strategic and the day-to-day management of corporations doing business in global markets. Yet, positivist and pragmatist paradigms, by offering only empirical and instrumental analysis of global governance regimes, fail to *justify* these regimes by suggesting or arguing that the responsibility of global actors to respect the rule of law and human rights is an ethical or moral responsibility, and should be recognized as such by the actors themselves.<sup>479</sup> Moreover, there is not much effort in

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<sup>472</sup> See Wesley Cragg, *Ethics, Law and Corporate Self-Regulation*, in *ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION* 23, 23–42 (2005).

<sup>473</sup> Jackson, *supra* note 413, at 442.

<sup>474</sup> *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (Feb. 25, 2011), <http://plato.stanford.edu/archives/win2011/entries/lawphil-nature>.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *See id.*

<sup>478</sup> *See supra* text accompanying notes 303–311.

<sup>479</sup> *See* Kroeze, *supra* note 71, at 65–66.

the initiatives themselves to explain or justify this aspect of the soft law initiatives.<sup>480</sup> This omission is important because the failure to ground global governance regimes on explicitly moral foundations assumes that the descriptive and instrumental justifications of the sort that positivism and pragmatism supply are sufficient jurisprudential models for the regimes.<sup>481</sup>

Following the positivist frame of reference leads to a hasty dismissal of soft law regimes as being devoid of significant authority.<sup>482</sup> Because they are not really “legal” in nature, the argument would run, they cannot have the power and persuasiveness of genuine law and thus are merely voluntary and recommendatory in nature.<sup>483</sup>

Following the pragmatist frames of reference, the mainstream justificatory foundations offered to corporations for endorsing and implementing global governance regimes are instrumental and functionalist, centered on the concept that the purpose of the firm is to pursue profit maximization.<sup>484</sup> Nevertheless, the profit-maximization characterization of the firm has been challenged, if not repudiated.<sup>485</sup>

Why have descriptive and instrumental accounts of soft law tended to dominate discussion of it? Descriptive approaches may do so because empirical rather than normative grounding for soft law has been adopted out of a belief that associating soft law mechanisms with ethics would be counterproductive.<sup>486</sup> Indeed, “[u]nderlying this conclusion might be the view that given the variety of ethical values and ethical sys-

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<sup>480</sup> See DONALDSON, *supra* note 413, at 45–46.

<sup>481</sup> See HELMUT ANHEIR ET AL., U.N. DEV. PROGRAM, *THE FUTURE PARTICIPATING CIVIL SOCIETY ASSESSMENTS: A CONCEPTUAL ANALYSIS* 33–34 (2011) (urging qualitative and interpretive study alongside technical and quantitative approaches).

<sup>482</sup> See DANILENKO, *supra* note 349, at 20.

<sup>483</sup> See *id.* It is important to be clear about what “voluntary” means in the global governance context. On one hand “voluntary” generally denotes that which is not legally required (for example, not subject to sanction for noncompliance), a matter of discretion frequently dictated by pragmatic concerns such as cost-benefit calculations. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 667 (1996). Nevertheless, it would not necessarily follow from the fact that some standard is voluntary from a legal positivist perspective that the standard is voluntary from a legal naturalist perspective. Although lying and deceiving others is not always illegal and liable to legal sanction, it does not follow that economic actors are free, from a moral standpoint, to lie or deceive others at their own discretion; nor does it follow that such actors are ethically free to weigh the benefits against the costs of lying versus truth-telling.

<sup>484</sup> See, e.g., Cragg, *supra* note 243, at 14.

<sup>485</sup> See Don Mayer, *Legal Loopholes, Business Ethics, and Corporate Legal Strategy: A Reply to Professor Ostas*, 48 AM. BUS. L.J. 713, 739–40 (2011).

<sup>486</sup> Cragg, *supra* note 472, at 10.

tems encountered in the global marketplace and endorsed by managers, shareholders and the wide range of other corporate stakeholders, building on an explicitly ethical foundation would invite distracting debate and disagreement.”<sup>487</sup>

As for the instrumental accounts, it may be the case that, most commentators, practitioners, and theorists of global governance believe that they must make a business case for soft law to get corporate buy-in.<sup>488</sup> In other words, the case for soft law must be directly connected to the popularly assumed economic purpose of the contemporary, shareholder-owned corporation—profit maximization.<sup>489</sup>

There are risks, however, in an excessively pragmatic approach to justifying soft law regimes. NGOs play an important role in global governance discourse. It is important that the concerns of such a group of stakeholders are morally grounded in the rule of law ideal and in human rights.<sup>490</sup> Pragmatic argument is not irrelevant in discussions of the emergence of soft law alongside hard law. The standards against which progress is measured, however, must not be limited to empirical tests, but must instead be based on normative standards.

From a general public policy perspective, it is important that economic participants are active in the development of soft law. This importance is based on a common public justification tied to the common good and the intrinsic value of human rights, not simply because doing so will advance economic actors’ narrow instrumental business interests.<sup>491</sup>

Corporations are certainly integral participants in this discussion, because it is their conduct that needs to be altered for progress to come about in emerging soft law initiatives.<sup>492</sup> Further, shareholders and owners will demand justification for incorporating soft law initiatives into the corporation’s operations from their senior management and corporate boards of directors.<sup>493</sup> Thus, it is necessary for management to answer the crucial question whether endorsing and implementing voluntary soft law initiatives is justified to boards and shareholders for whose investments they are stewards.<sup>494</sup>

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<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 11.

<sup>491</sup> *Id.*

<sup>492</sup> Cragg, *supra* note 472, at 11.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

One might suppose that, because soft law regimes have been widely embraced by the business community, the issue of justification is moot from a corporate perspective.<sup>495</sup> Nevertheless, this is not the case, as there is a great difference between endorsing soft law initiatives and actually implementing them, notwithstanding whatever persuasive, pragmatic, and strategic reasons exist for their corporate support.<sup>496</sup> When all is considered, what matters most is implementation in action—not commendation in words—which involves making tough decisions about allocating resources, formulating strategic plans, and running daily business affairs.<sup>497</sup>

Ultimately, the vital issue is whether the justificatory foundation of soft law regimes will stand up under the empirical pressures of corporate strategic planning and everyday operations when the difficult practical implications of implementation surface.<sup>498</sup>

Viewing the matter from the standpoint of positivist assumptions, translating soft law initiatives into action is probable only with the backing of legal sanctions.<sup>499</sup> This view explains the motivation of draft “[n]orms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.”<sup>500</sup> It is also implicit in NGO critiques of the UN framework.<sup>501</sup>

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<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> Cragg, *supra* note 472, at 11.

<sup>499</sup> See *supra* text accompanying notes 119–22.

<sup>500</sup> U.N. Comm’n on Human Rights, Subcomm. on the Promotion and Protection of Human Rights, Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, at 1, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).

<sup>501</sup> Cragg, *supra* note 472, at 11. As Amnesty International comments:

If, as the SRSG has stated, “the responsibility to respect is the baseline expectation for all companies in all situations” and “to discharge the responsibility to respect requires due diligence,” then it logically follows that all companies should carry out some level of human rights due diligence. As presently written, the draft Guiding Principles effectively make corporate human rights due diligence a voluntary tool for business. In so doing, the Guiding Principles speak only to those companies that are willing to ensure their activities respect human rights. Those companies—a small minority—then face an unlevel playing field, as other companies may choose not to undertake human rights due diligence. A level playing field would be facilitated by States requiring human rights due diligence in clear terms.

AMNESTY INT’L, COMMENTS ON THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES’ DRAFT GUIDING PRINCIPLES AND ON POST-MANDATE ARRANGEMENTS 2 (2010), *available at*



As we have seen, since positivism fails to provide an adequate justificatory model, by default the received model on which soft law regimes often rest is a pragmatic, instrumental jurisprudence model grounded on: (1) an appeal to conventionally understood business interests (for instance, profit maximization); and (2) an appeal to the “governance deficit”—the notion that global problems are not capable of being handled by states alone.<sup>502</sup>

Regarding the first point, there is no question that demonstrating a course of action’s profitability is a strong practical justification for enlisting compliance with soft law by business enterprises.<sup>503</sup> The issue remains whether such a demonstration is possible or can be plausibly presented when the requisite costs and benefits associated with implementation are considered.<sup>504</sup> Building an explicit moral dimension into the global governance regime by seeing it as justified by non-instrumental respect of rule of law and human rights is consistent with the shift away from the shareholder, and toward the stakeholder model of corporate governance.<sup>505</sup> Under such a view, corporate management is responsible for the rational deployment of intrinsically valuable goods (for example, human rights), with profitmaking as a predictable side-effect, not as the end-all-and-be-all of business.<sup>506</sup>

Regarding the second point, there is no doubt that, as a political reality, a course of action in response to the governance deficit is likely and perhaps even inevitable.<sup>507</sup> Yet, just because the state is relegated to one among multiple power players in global governance does not mean that all of the rule of law criteria that attended the hard law regime are to be ignored.<sup>508</sup> Despite the decentralization, fragmentation, privatization, interconnectedness, and appearance of structural injustice, the rule of law and human rights remain reliable normative

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<http://195.234.175.160/en/library/asset/IO50/002/2010/en/6b5324eb-55ca-4d3c-ba9d-b15abdf65b2/ior500022010en.pdf>.

<sup>502</sup> See generally Peter M. Haas, *Addressing the Global Governance Deficit*, 4 GLOBAL ENVTL. POL. 1 (2004) (arguing for reform of the United Nations and Bretton Woods systems to address the global governance deficit).

<sup>503</sup> Cragg, *supra* note 472, at 12.

<sup>504</sup> *Id.*

<sup>505</sup> Cf. DONALDSON, *supra* note 413, at 45–47 (explaining the lack of justification and explicit theoretical moral grounding for the stakeholder model).

<sup>506</sup> See *id.*

<sup>507</sup> See John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Global Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 3, 4 (John J. Kirton & Michael J. Trebilcock eds., 2004).

<sup>508</sup> See *id.* at 6, 11.

guideposts.<sup>509</sup> Soft law stands in need of a justificatory basis, namely, a common public justification for it, that is oriented toward the global common good and human rights.<sup>510</sup>

Concordant with the tradition of natural law theory and law-as-integrity, a legal naturalist paradigm for global economic governance points to correlations between unwritten moral law and written norms for states, NGOs, IGOs, and business enterprises as a means of establishing the moral legitimacy of those norms.<sup>511</sup>

#### A. *Rule of Law*

This section focuses on examining the presuppositions of global governance as an idea, and in particular, how that idea relates to the concept of the rule of law. The rule of law ideal asserts the primacy of law over the arbitrary exercise of political or economic power by using law to tame power.<sup>512</sup> It values the protections of the citizen from the arbitrary actions of the government or business enterprises by making all of them and their relationships subject to impersonal and impartial law.<sup>513</sup> The rule of law ideal also maintains the primacy of universalism over particularism through the principle of equality in law, whereby individuals coming before the law—whether in public or in private institutional contexts—are treated as individuals, divorced from their social characteristics.<sup>514</sup>

A normative commitment to the rule of law implies a commitment to the principle of relations being governed by law, not power.<sup>515</sup> It also implies a willingness to accept the limitations and constraints of working within the law, in specific instances if necessary, against individual notions of just or illegitimate outcome. Fidelity to global economic governance regimes, international laws, and institutions must be required of and demonstrated not only by all states, but also by corporations and other economic participants.<sup>516</sup>

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<sup>509</sup> *See id.*

<sup>510</sup> *Cf. id.* (describing the challenges associated with soft law).

<sup>511</sup> *Cf. Antonio Franceschet, Ethics, Politics and Global Governance, in THE ETHICS OF GLOBAL GOVERNANCE 1, 4* (Antonio Franceschet ed., 2009) (distinguishing four paradigmatic moral visions for global governance: reform, responsible governance, cosmopolitan community, and critique).

<sup>512</sup> *See TAMANAHA, supra* note 10, at 122.

<sup>513</sup> *See id.*

<sup>514</sup> *See id.* at 74–77.

<sup>515</sup> *See id.* at 122.

<sup>516</sup> *Cf. id.* at 131–33 (describing problems with the formal legality of international law).

Cherry-picking norms and law for instrumental aims or in a display of unbridled discretionism is incompatible with using those norms and laws to urge compliance by others. Logic dictates that the right to demand respect for the rule of law should only be given to those corporations, states, and organizations who seek to uphold the rule of law ideal themselves.<sup>517</sup>

### 1. Rethinking Rule of Law as a Regulative Principle

The concept of a regulative principle or ideal, attributable to Immanuel Kant, is helpful in clarifying the meaning of rule of law in the global governance context. In *Critique of Pure Reason*, his epistemological *tour de force*, Kant ventured to establish what we are able to know and how we can know it.<sup>518</sup> In doing so, Kant demonstrated the way that our observation of the world around us must be bound together and organized on the basis of certain basic ideas and concepts.<sup>519</sup> These basic concepts, such as the idea of cause and effect, operate to shape our knowledge and understanding, and without them our experience of the world would collapse into an incomprehensible morass of stimuli and sensations.<sup>520</sup> Kant argued that some ideals are unattainable, yet serve a key function in our thinking.<sup>521</sup> Among such ideas are those of truth, goodness, and beauty.<sup>522</sup> Our efforts to approach such ideals exert a profound influence on our actions, and our regard for them plays a vital role in the critical capacity that we exercise in accepting some views and rejecting others.<sup>523</sup>

It is in *Critique of Pure Reason* that Kant sets forth the notion of a regulative principle which, as an ideal, is a specific, singular concept that exemplifies the perfection of some action, process, or object.<sup>524</sup> For instance, an ideal legal order would be fair, treat all citizens as equals, resolve disputes in an objective and enlightened way, and so forth. It is not possible for a regulative principle actually to be realized in the course of actual events. Consequently, critics of Kant's philoso-

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<sup>517</sup> See *id.* at 135–36.

<sup>518</sup> See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 41 (Norman Kemp Smith trans., St. Martin's Press 1956) (1781).

<sup>519</sup> See EBENSTEIN & EBENSTEIN, *supra* note 387, at 474.

<sup>520</sup> See IMMANUEL KANT, *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: CRITIQUE OF PURE REASON* 9–10 (Paul Guyer & Allen W. Wood eds. & trans., 1998).

<sup>521</sup> See Ron Bontekoc, *Truth as a Regulative Ideal*, 13 J. SPECULATIVE PHIL. 240, 246–47 (1999).

<sup>522</sup> Cf. *id.* at 247 (“[T]he unity of the true must never be taken as realized.”).

<sup>523</sup> See 6 FREDERICK C. COPLESTON, *A HISTORY OF PHILOSOPHY* 141–70 (1960).

<sup>524</sup> See KANT, *supra* note 518, at 550–51.

phy attack it for laying emphasis upon states of affairs that are in fact inaccessible or unattainable.<sup>525</sup> But such a charge does not appreciate the role that ideas play in constituting the possibility of our understanding reality in the first place.<sup>526</sup>

A principle is regulative, as opposed to constitutive, when it is unachievable yet able to guide, balance, and mediate our actions in practical matters.<sup>527</sup> A regulative principle constitutes an ideal to aim for, and by which we are put in a position to measure our progress.<sup>528</sup> According to Kant, regulative principles come into play in reconciling conflicts that reason itself generates.<sup>529</sup> This occurs in the case of the antinomies of pure reason. As maxims of our thought, regulative principles stem from our interest in gaining a potential perfection of knowledge about some object.<sup>530</sup> By contrast, constitutive principles dictate how things themselves exist, derived from our insight into their fundamental nature.<sup>531</sup> Contradictions arise when one adopts a maxim such as “everything must have a cause” as a constitutive rather than a regulative principle.<sup>532</sup>

As distinguished from setting goals, which carry with them some expectation of attaining results, the formulation of ideals does not necessitate any commitment to actually bringing about or realizing anything. Whereas goals have the potential to be achieved, they can also produce underachievement, leading to disillusionment and frustration. Since ideals are not staked upon an actual attainment of results, they serve to focus upon moving toward an unattainable end-state rather than—as with goals—focusing upon an arbitrarily posited outcome.<sup>533</sup>

Within the ideal realm, Kant contends that separate ideals do not necessarily contradict one another.<sup>534</sup> Thus, we may go in pursuit of

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<sup>525</sup> See Bontekoe, *supra* note 521, at 246.

<sup>526</sup> See, e.g., ROBERT AUDI, *EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE* 265–69 (2003).

<sup>527</sup> See KANT, *supra* note 518, at 210–11.

<sup>528</sup> See *id.* at 553.

<sup>529</sup> See *id.* at 210–11.

<sup>530</sup> See *id.* at 258.

<sup>531</sup> See *id.* at 211.

<sup>532</sup> Here the countervailing antinomy would be the maxim that the universe was not caused but instead has always existed. A further development of the regulative-constitutive distinction is adopted by John R. Searle in explaining how some rules—those of the game of chess, for example—not only regulate the activity, but function to constitute it as well. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 27–28 (1995).

<sup>533</sup> See KANT, *supra* note 518, at 490–92.

<sup>534</sup> See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor & Jens Timmerman eds. & trans., Cambridge Univ. Press 2011) (1797) (dis-

composite ideals, established when multiple ideals are assembled together. These sorts of composite ideals enable the negotiation of diverse ideals alongside each other simultaneously. In this way, we may aim for some state of affairs more acceptable to all. Of course we do not live in an ideal realm, and thus conflicts arise among ideals all the time.<sup>535</sup>

Although global governance may possess numerous beneficial features,<sup>536</sup> it nevertheless remains questionable in terms of its capability to protect and promote the international rule of law, which would seem to presuppose some deeper authoritativeness or legitimacy. Accordingly, it is necessary to clarify the concept of an international rule of law (understood as a regulative idea in Kant's sense discussed above), and then discuss the significance of that idea for the question of the moral authority of global governance regimes.<sup>537</sup>

## 2. Understanding the Rule of Law

The problem of providing an adequate account of the rule of law is among the most important issues that global governance and international law must address.<sup>538</sup> Among the various interpretations of the rule of law, the more widely accepted range is across the so-called "thin" versus "thick" spectrum, accompanied also by the "rule-by-law" idea.<sup>539</sup> At one end of the spectrum, the "thin" or "formal" conception holds that the rule of law merely requires that law be publicly declared, apply only prospectively, and accomplish generality, equality, and a reasonable degree of predictability.<sup>540</sup> Beyond that, except for sharing an opposition to the arbitrary exercise of power, thin conceptions do not at-

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cussing this idea in Part II of the work, entitled: "Transition from popular moral philosophy to the metaphysics of morals").

<sup>535</sup> Balancing and synchronizing such ideals is what Nicholas Rescher terms "optimization." NICHOLAS RESCHER, *ETHICAL IDEALISM: AN INQUIRY INTO THE NATURE AND FUNCTION OF IDEALS* 75–76 (1987). Rescher states that an ideal constitutes a "component within a system, which makes it possible to strike a reasonable balance between the different and potentially discordant values." *Id.* at 125.

<sup>536</sup> It may possess beneficial features at least from the standpoint of satisfying a range of commercial and political interests of many members of civil society, among them the promotion of more responsible competitiveness across global markets. *Cf.* Simon Zadek, *Responsible Competitiveness: Reshaping Global Markets Through Responsible Business Practices*, 6 *CORP. GOVERNANCE* 334, 339–40 (2006) (advancing a model of responsible corporate behavior learning from broad societal values).

<sup>537</sup> See *infra* text accompanying notes 548–53.

<sup>538</sup> See TAMANAHA, *supra* note 10, at 127–28.

<sup>539</sup> See *id.* at 91–92. Beyond these there are other accounts, such as those asserting that the rule of law constitutes a set of ideals that protect political arrangements such as democracy, or promote economic arrangements such as free market capitalism.

<sup>540</sup> See *id.*

tribute any particular requirements with respect to the content of law.<sup>541</sup> At the other end of the spectrum, “thick” or “substantive” conceptions deem the rule of law to entail protections for individual rights and to incorporate substantive considerations of justice.<sup>542</sup> Under the “rule-by-law” conception, the idea of the rule of law stands in contrast to the discretionary rule of men, which is associated with abuse of power by government officials.<sup>543</sup>

Regarding the thin and thick distinction, it may be helpful to understand it in the way that mathematics treats dimensions. We can acknowledge the multidimensional character of the rule of law, noting that the thicker conceptions differ from the thinner ones by virtue of additional “coordinates” being added. Consequently as one moves to a “higher” (“thicker”) dimension, the “lower” (“thinner”) dimensions are not discarded but instead remain intact.<sup>544</sup> As one scholar similarly articulates, “[s]ubstantive theories are typically built on the back of formal ones.”<sup>545</sup> Additionally, in making comparisons amongst the various candidate conceptions, it is good to bear in mind the admonition that “a common critique of those who claim to articulate ‘thin’ theories is that substantive elements have been included by stealth.”<sup>546</sup>

This Article contends that a rule of law obtains only where actions—including not only those acts of sovereign states and their agents, but also those of diverse economic actors in international institutions—are constrained by the regulative idea of law. This argument returns us to the exceedingly challenging question of what law is, which was raised earlier in the discussion of alternative jurisprudential paradigms.<sup>547</sup>

For the instant purpose, it is useful to clarify the function of international law, which involves three concrete points. First, international law’s function is to attain an end state desired by those whose conduct

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<sup>541</sup> See *id.* at 93.

<sup>542</sup> See *id.* at 92.

<sup>543</sup> See *id.* at 92–93.

<sup>544</sup> TAMANAHA, *supra* note 10, at 91.

<sup>545</sup> Simon Chesterman, *An International Rule of Law?* 56 AM. J. COMP. L. 331, 341 (2008); see Randall Peerenboom, *Varieties of Rule of Law*, in *ASIAN DISCOURSES OF RULE OF LAW* 1, 5–6 (Randall Peerenboom ed., 2004). One scholar suggests that the thin versus thick conceptions may be visualized as concentric circles, with the inner circle containing core components of a thin rule of law and itself embedded within a thick rule of law framework. Peerenboom, *supra*, at 5–6.

<sup>546</sup> Chesterman, *supra* note 545, at 341.

<sup>547</sup> See, e.g., *supra* text accompanying notes 118–122.

is governed by the authority of that law.<sup>548</sup> Second, international law functions to bring about justice within a wide array of instances of human, state, and institutional interaction.<sup>549</sup> Arguably, one persistent threat is the detachment of this key function of international law from the non-instrumental concept of law. As a consequence, this view instead considers law purely as an instrument for policy, used to impose the will of the more powerful components of the international order (whether sovereign states, powerful multinational corporations, the ultra-rich, *et cetera*).<sup>550</sup> Third, international law functions to resolve transnational political, economic, and social conflicts.<sup>551</sup> It does this by establishing coherent boundaries as to what conduct people, states, and institutions can expect from one another.<sup>552</sup> In this way, international law continually evolves in providing ways to establish a state of equilibrium in response to deviations from the norms that have been established.<sup>553</sup>

The rule of law is guaranteed in the international context only if those harmed by noncompliance possess some means of redress against those who have broken the rules.<sup>554</sup> Here, the violation of law is conceived as an abuse of power. While the “vertical” sovereign abuse of power has traditionally been a central focus of rule of law conceptions, the idea of the rule of law need not be restricted to vertical sovereign abuse of power, but expanded to encompass other “horizontal” abuses of power as well.<sup>555</sup> After all, in civil activities, one private party sues another where the gravamen of complaint is that they, as a co-equal citizen, have broken the law.<sup>556</sup>

One benefit of conceiving of the rule of law this way is that it avoids the problem of granting states a “monopoly” to handle the en-

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<sup>548</sup> See, e.g., TAMANAHA, *supra* note 10, at 130 (explaining voluntary adherence to global economic norms because of states’ desire to create a predictable commercial landscape).

<sup>549</sup> See William W. Bishop, *The International Rule of Law*, 59 MICH. L. REV. 553, 554–55 (1961).

<sup>550</sup> See TAMANAHA, *supra* note 10, at 136.

<sup>551</sup> See Eric Ip, *Reconceptualising the International Legal Regime: Law, Politics, and Institutions*, 2 NW. INTERDISC. L. REV. 57, 67 (2009).

<sup>552</sup> See *id.*

<sup>553</sup> See TAMANAHA, *supra* note 10, at 127–28.

<sup>554</sup> Cf. *Towards Operationalizing*, *supra* note 200, ¶ 86 (explaining the need for access to remedy in an international regulatory framework).

<sup>555</sup> Cf. Erwin Chemerinsky, *Towards a Practical Definition of the Rule of Law*, 46 JUDGES’ J. 4, 5–8 (2007) (noting rule of law principles applied equally to government and private action).

<sup>556</sup> See *id.* at 7.

forcement of law.<sup>557</sup> Whereas the idea of separation of powers has proved an effective balance to over-concentration of sovereign power, expanding the rule of law to other forms of governance provides new avenues for separation of power to gain currency in the global context.<sup>558</sup>

Rule of law is an end state of affairs where law as a system of norms is deployed in a way that justifies its existence and authority over a community of persons.<sup>559</sup> The rule of law is opposed to arbitrary use of power (whether that power is state or non-state); it entails that some measure of certainty obtains in society whether in the short or long term; it is a system of general norms that enables people to foresee how they will interact, or choose not to interact, with other citizens and with institutions public and private.<sup>560</sup>

It should be clear from the discussion so far that rule of law is not an all-or-nothing idea. Moreover, emerging global governance devices, such as public-private collaboration, that blur traditional distinctions sanctified under “hard” public international law categorizations, are not in themselves necessarily good or bad things.<sup>561</sup> In each case it becomes important to scrutinize questions such as: whether a collaborative governance arrangement becomes in practice a form of “corporatocracy;”<sup>562</sup> whether checks and balances exist within the collaborative relationship to restrain despotism in private and nongovernmental forms; whether the collaboration is a convenient shield for deflecting

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<sup>557</sup> See, e.g., TAMANAHA, *supra* note 10, at 116–17 (noting ways in which states could be held liable to their subjects for abuses of power).

<sup>558</sup> Cf. Ruggie, *supra* note 204, at 833–35 (identifying IGOs such as OECD, as well as self-regulation, as restraining corporate action where states do not do so directly).

<sup>559</sup> Cf. Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN’S L.J. 259, 270–71 (2005) (“If legal norms can be shown to have intrinsic and autonomous value, their authority needs no further justification in terms of some greater good or political ideal.”).

<sup>560</sup> FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

<sup>561</sup> See, e.g., Christopher G. Bradley, *Partner Capture in Public International Organizations*, 44 AKRON L. REV. 261, 271 (2011) (using the privately-funded U.N. Foundation as an example of a public-private partnership that enhances the public partner’s ability to reach its goals, but also leaves that partner susceptible to “capture” by agents of the private partner).

<sup>562</sup> See *Corporatocracy*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/definition/american\\_english/corporatocracy](http://oxforddictionaries.com/definition/american_english/corporatocracy) (last visited Feb. 15, 2013) (defining corporatocracy as “a society or system that is governed or controlled by corporations”). In some cases, a government state is effectively dominated by and for a powerful corporation rather than by and for its citizens. See JENNIFER GREEN & BETH STEPHENS, *HUMAN RIGHTS LITIGATION AND THE CORPORATE ACCOUNTABILITY MOVEMENT 1* (2008), available at <http://www.reports-and-materials.org/Jennifer-Green-and-Beth-Stephens-commentary.pdf>. Multinational firms can relocate their operations from a country if its government adopts policies contrary to the firm’s interests. See *id.*



responsibility, passing off blame to the another party; and whether NGOs that are parties to the syndicate, are themselves being held accountable;<sup>563</sup> and whether a collaborative governance scheme is a front for “crony capitalism.”<sup>564</sup>

### 3. Taking a Non-Instrumental Viewpoint

According to Brian Tamanaha, the non-instrumental conception of law holds that “the content of law is, in some sense, given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; that law is, in some sense, objectively determined.”<sup>565</sup>

This perspective contrasts sharply with the view of legal pragmatism, discussed earlier, which sees law as an instrumental process determined by non-legal factors, and whose legitimacy comes entirely from its ability to serve social purposes.<sup>566</sup> To recapitulate what was said earlier about pragmatism: on such an account, whether one is considering a domestic or international context, all that law can ever amount to is policy.<sup>567</sup> The instrumental view conceives of the nature of law as simply a decision process, not as a coherent system of rules.<sup>568</sup> To the extent that law engages rules it does so only to promote the utilitarian objective of generating desired outcomes.<sup>569</sup> The authority of such norms derives from their effectiveness in realizing such outcomes.<sup>570</sup>

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<sup>563</sup> Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT’L L. 1011, 1011 (2011) (“NGOs need to be composed and governed accountably in order to legitimate their role in global governance.”).

<sup>564</sup> E.g., Afshin Molavi, *Buying Time in Tehran: Iran and the China Model*, 83 FOREIGN AFF. 9, 10 (2004). This can occur when a government extends a privileged group property rights in return for the group lending its support to the regime. *See id.* Typically this occurs in corporate arrangements with dictatorships. *See id.* at 9–10. Such a collaborative regime can establish a system of markets and government without relinquishing control from either sector.

<sup>565</sup> TAMANAHA, *supra* note 144, at 11.

<sup>566</sup> *See supra* Part II.B.

<sup>567</sup> Cf. Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT’L L. REV. 237, 250–51 (1997) (recounting the view of law under pragmatist influence in early communist China as being subject to instrumental aims of rulers).

<sup>568</sup> *See id.*

<sup>569</sup> *See id.*

<sup>570</sup> Cf. Robert Justin Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645, 654 (1988) (stating judicial pragmatism favors decision-making based upon future results rather than precedent).

By contrast, non-instrumental norms are those which ought to be respected for their own sake, apart from some desired result or strategy.<sup>571</sup> An example of a nonstrategic norm at the heart of the rule of law and human rights is one prescribing that citizens are related to each other as moral equals, according to which they enjoy what Dworkin calls the “right to treatment as an equal.”<sup>572</sup> Likewise, the familiar requirements of the rule of law which curb arbitrariness and discretionism, such as *nullum crimen, nulla poena sine praevia lege poenali*, and the demand that laws be published, non-retroactive, clear, ascertainable, and so on, are all of a non-instrumental character.<sup>573</sup>

The existence of nonstrategic norms is what enables one to distinguish between just and unjust uses of force or coercion. In this sense, while they are similar to moral principles, they are nevertheless internal to law. It should be noted as well in response to the radical skepticism mentioned earlier, that any theoretical approach that denies the possibility of objective moral truth cannot serve to justify an international rule of law.<sup>574</sup> In this sense, the rule of law applied to the global realm finds legitimation on the basis of universal ideas such as Kant’s concept of a human person as a member of a universal legal and moral community, and the notion of a cosmopolitan democracy.<sup>575</sup>

## B. *Beyond Legality Towards Legitimacy*

### 1. The Concept of Legitimacy

We can distinguish between the legal positivist’s coercion, the legal pragmatist’s self-interest and consequentialism, and the legal naturalist’s universal legitimacy as alternative grounds for obedience to law.<sup>576</sup> Precisely because no international government exists to enforce them, the compliance of corporations, IGOs, NGOs, and states with global soft law norms for sustainability and human rights is a function of the legitimacy of those rules as perceived by the norm-conforming partici-

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<sup>571</sup> See TAMANAHA, *supra* note 144, at 11.

<sup>572</sup> DWORKIN, *supra* note 290, at 227–29.

<sup>573</sup> See Walter F. Murphy, *Transitions to Constitutional Democracy and the Fate of Deposed Despots*, 81 DENV. U. L. REV. 415, 438–39 (2003).

<sup>574</sup> See Bernard Dobranski, *New Lawyers for a New Century: Legal Excellence and Moral Clarity: The Founding of Ave Maria School of Law*, 36 U. TOL. L. REV. 55, 58 (2004).

<sup>575</sup> See DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY* 120–21 (2008).

<sup>576</sup> See Hurd, *supra* note 68, at 379.

pants.<sup>577</sup> That is, they are regarded as proper or appropriate by the actors to whom they are addressed within the governance scheme.

If the source of legitimacy is institutions (either formal organizations or recurring and stable patterns of behavior), then those institutions indicate the existence of an international authority, even in the absence of world government. For “the international system clearly exhibits some kind of order in which patterns repeat, institutions accrete, and practices are stable.”<sup>578</sup>

What might lead one to suppose that global economic governance regimes generate not simply “soft law” policies or purely discretionary and unenforceable norms, but morally grounded obligations, specifically for non-state actors such as corporations? After all, conceiving of corporations as juridical agents accountable under the rule of law and human rights is a relatively new idea.<sup>579</sup>

One way to answer this question is to query: how does the position of business enterprises, as private entities, compare to that of states, as public entities? If states have rule of law obligations, and if states are bound to protect human rights, do private corporations have these kinds of duties as well? Are the sort of characteristics that lead one to attribute responsibility for upholding the rule of law and human rights to states, and that lead states to assume that responsibility, similar in morally relevant ways to the characteristics that business enterprises have?

Discourse about the international legal obligations that states have often neglects to acknowledge that many obligations, such as human rights obligations, while today reflected in positive international law, actually stem from deeper normative or moral roots.<sup>580</sup> In addition, they are in significant respects voluntary, which is a characteristic often passed over by positivist views.<sup>581</sup> A signal of their voluntary nature is the reality that while legal experts currently refer to the international legal obligations of states, most of these obligations arise from volun-

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<sup>577</sup> See *id.* at 396–98. Mark Suchman defined legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” *Id.* at 387.

<sup>578</sup> See *id.* at 400.

<sup>579</sup> See, e.g., Arat, *supra* note 40, at 5–6 (explaining how the framework for the current human rights regime has only been in place since World War II).

<sup>580</sup> See Hurd, *supra* note 68, at 387.

<sup>581</sup> See *id.* at 387–88.

tary agreements, such as treaties and conventions, and in fact rely upon the willing participation of a state for their implementation.<sup>582</sup>

This means that the obligation of states to respect and uphold the rule of law is predominantly a moral obligation that, over time, has come to be seen as something that is apt to gain legitimacy by being accorded a legal status.<sup>583</sup> It should be noted that the decision to extend legal status to international human rights was not something that was itself legally mandated.<sup>584</sup> The Universal Declaration of Human Rights was an initiative that was voluntarily proposed and adopted by the respective states that endorsed it as an international legal instrument.<sup>585</sup>

Corporations are akin to states in possessing the power to oppose or promote sustainability and to honor or disregard human rights.<sup>586</sup> The point is brought out in John Ruggie's report that "there are few if any internationally recognized rights business cannot impact—or be perceived to impact—in some manner. Therefore, companies should consider all such rights."<sup>587</sup> Moreover, the sustainability and human rights violations committed by business enterprises are similar in type and seriousness to violations that states have historically carried out.<sup>588</sup> Corporations have acquired this power as a consequence of the rise of globalization and the governance gaps that have accompanied that trend.<sup>589</sup>

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<sup>582</sup> E.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 488 (2005) ("A first defining characteristic of international treaty law is the voluntary nature of the legal obligation it imposes. Treaties operate directly on states, but if a state does not consent to an international treaty, it is clearly not bound by its provisions.").

<sup>583</sup> See T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 38, 85 (2001).

<sup>584</sup> See Arat, *supra* note 40, at 4.

<sup>585</sup> See *id.*

<sup>586</sup> Sustainability and human rights are intimately connected because the idea of sustainability itself is grounded in an inclination toward democracy, environmental stewardship, human rights, peace, and socioeconomic justice. See STEPHEN STERLING, *SUSTAINABLE EDUCATION: RE-VISIONING LEARNING AND CHANGE* 16–17 (2001).

<sup>587</sup> *Protect, Respect and Remedy*, *supra* note 29, ¶ 52.

<sup>588</sup> Cf. Daniel Baer, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights*, HUMANRIGHTS.GOV (June 16, 2011), <http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/> ("In States that violate human rights, it will be more difficult for businesses to respect those rights—because domestic law may require actions inconsistent with internationally recognized human rights, because State practices encourage businesses to take actions that undermine the enjoyment of human rights, or because States involve businesses in their own human rights violations.").

<sup>589</sup> See *Protect, Respect and Remedy*, *supra* note 29, ¶ 17.

It is also significant to note that, like governments, business enterprises not only have the capacity to violate human rights, but also the resources to institutionalize compliance with human rights within their operations.<sup>590</sup> As with states, business enterprises are able to curtail human rights violations and implant due regard for human rights in their dealings with business partners.

## 2. Global Common Good

It is important to consider the relation between the rule of law and the multiplicity of “publics” that are relevant to the idea of a common public justification that would be aimed at the common good. In global economic governance, a substantial part of the process of rulemaking connected with sustainability and human rights standards is quite remote from any strictly democratic process.<sup>591</sup> The idea of the rule of law, however, presupposes the existence of some group of persons—some public, that is—in whose name the law stands.<sup>592</sup> According to the rule of law, legal norms must be representative of the entire society and be addressed to issues of concern to society per se, as opposed to merely pertaining to matters of personal interest to people or groups that create the rules.<sup>593</sup>

Because the aspect of public legitimacy is related to the democratic process of law-making, there are of course limits to this being realized at the international level.<sup>594</sup> After all, there is no global democracy in place in our world.<sup>595</sup> Although there is a tendency of global economic governance to extend the range of actors involved in formulating rules, there appears to be no immediate likelihood that transnational governance will institute processes that closely resemble democratic procedures within states.<sup>596</sup>

As more and more sector-based and non-state agents assume roles in global economic governance regimes, the question naturally arises whether such parties are authentic representatives of the public.<sup>597</sup>

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<sup>590</sup> See *Further Steps*, *supra* note 202, ¶¶ 91–95.

<sup>591</sup> See Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751, 753–54 (2011).

<sup>592</sup> See Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 700 (2009).

<sup>593</sup> See *id.*

<sup>594</sup> See Hurd, *supra* note 68, at 401.

<sup>595</sup> See *id.*

<sup>596</sup> See *id.* at 401–02.

<sup>597</sup> See Backer, *supra* note 591, at 771–72.

Also, we may wonder whether it makes sense to speak of a decision, along with the rules and principles upon which it is rendered, as standing in the name of an entire community when its actual audience may be narrower.<sup>598</sup>

Accordingly, there is a need for naturalist cosmopolitan jurisprudence to provide an account of the common good in global society as an anchor for legitimacy. Against the backdrops of pluralism and individualism across many cultures, it seems difficult to construct a shared notion of the common good.<sup>599</sup>

Nevertheless, the naturalist framework presented in this Article provides a starting point for a trans-cultural idea of the common good.<sup>600</sup> By indicating the basis of what it is to be human, naturalism holds promise for carving out a space within which to find common ground.<sup>601</sup> Under the naturalistic conception, human rights are the moral rights that all human beings possess in virtue of being human.<sup>602</sup> The natural capacities for reason and the freedom and autonomy that we possess are fundamental with respect to our dignity as human beings.<sup>603</sup> Human rights serve to safeguard and to further advance that dignity.<sup>604</sup> Moreover, “[t]he basic goods of human nature are the goods of a rational creature.”<sup>605</sup> Human rights command respect and protection for the most basic and urgent claims on the moral spectrum, and they correlate to similarly urgent moral obligations.

In seeking to understand the concept of the common good, there are a variety of meanings associated with the term.<sup>606</sup> For purposes of the present discussion, the common good is more than the competing interests of individuals and various cultures and more than the composite interests of special interest groups such as NGOs. It is the good we have in common—the communal conditions necessary for the virtuous pursuit of human fulfillment, flourishing, and perfection by all in society.<sup>607</sup> Ultimately, the common good is the aggregation of collaborative

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<sup>598</sup> Benedict Kingsbury, *International Law as Inter-Public Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167, 174 (Henry R. Richardson & Melissa S. Williams eds., 2009).

<sup>599</sup> MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 21 (1989).

<sup>600</sup> See *supra* Part II.C.3.

<sup>601</sup> See *supra* text accompanying notes 411–415.

<sup>602</sup> See *supra* text accompanying notes 387–388.

<sup>603</sup> See NOVAK, *supra* note 599, at 75–77.

<sup>604</sup> See, e.g., UDHR, *supra* note 388, at 71.

<sup>605</sup> Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 176 (2008).

<sup>606</sup> See NOVAK, *supra* note 599, at 175–88.

<sup>607</sup> See *id.* at 186–87. Similarly, Vatican II defines the common good as “the sum of those conditions of the social life whereby men, families and associations more adequately and readily may attain their own perfection.” *GAUDIUM ET SPES*, *supra* note 389, ¶ 74.

initiatives and shared restraints by which society helps everyone achieve what in the end only each individual can accomplish for himself: shaping a good will and constituting an authentically human self by freely choosing to actualize that good every time one is given the chance and responsibility to do so.<sup>608</sup>

Rather than supposing that the foremost problems of cosmopolitan jurisprudence are the technical ones of designing the right kind of legal architecture, of setting up the right mechanisms for coordinating and apportioning extraterritorial jurisdiction across states, or thinking that technical development will automatically create a prosperity that brings about justice and respect for human dignity, we need to address linkages of values shared across massive geographical and cultural chasms, as well as across barriers erected by income and wealth disparities. It is likely that significant shared values can be identified.<sup>609</sup>

Such a trans-cultural linkage of values can be seen in the existence of basic, incommensurable human goods identified by John Finnis and others.<sup>610</sup> The incommensurability of these goods means we cannot rationally measure one against another.<sup>611</sup> In treating basic goods as incommensurable, two things are accomplished. First, although hu-

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<sup>608</sup> See POPE JOHN PAUL II, ENCYCLICAL LETTER: *FIDES ET RATIO* ¶ 13, available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_15101998\\_fides-et-ratio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html) (“[H]ow could it be an exercise of true freedom to refuse to be open to the very reality which enables our self-realization?”); JEAN-PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* 29 (John Kulka ed., Carol Macomber trans., Yale Univ. Press 2007) (1947) (“[M]an is condemned to be free: condemned . . . because once cast into the world, he is responsible for everything he does.”).

<sup>609</sup> Donaldson, *supra* note 189, at 53–54.

<sup>610</sup> FINNIS, *supra* note 453, at 115. It should be noted that there is a degree of resemblance between this conception of basic incommensurable goods and the idea of “hyper-norms” as incorporated into integrative social contracts theory (ISCT). See generally Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252 (introducing ISCT). ISCT offers a communitarian account of economic ethics. *Id.* at 254. So in this regard, although contractualist in its basic structure, as offering an account about how we reach agreement concerning authentic norms of business ethics, ISCT can be understood as drawing upon a naturalistic paradigm at least for one of its cornerstone concepts as regards the basis for making judgments about which authentic norms are legitimate or illegitimate, that is, passing or flunking the hypernorms test, respectively. See *id.* at 265. In other words, ISCT presupposes that there are certain correct hypernorms that we ought to follow in judging whether local norms are finally morally right. The hypernorms are categorized as follows. Structural: engaging the duty to develop and fulfill obligations in connection with social structures that are efficient in achieving necessary social goods; Procedural: involving rights of voice and exit essential to support microsocial consent; Substantive: relating to promise-keeping and respect for human dignity. DONALDSON & DUNFEE, *supra* note 445, at 53.

<sup>611</sup> See FINNIS, *supra* note 453, at 115.

mans are free to choose, some moral absolutes remain.<sup>612</sup> While one possesses freedom as a human being, that freedom is not absolute (although of course one is always free in the deepest existential sense to reject morality).<sup>613</sup> One may not purposely assail a basic good like health or friendship.<sup>614</sup> Second, we eliminate right away pragmatist calculations of values that might license one to “do evil that good may come of it.”<sup>615</sup>

### CONCLUSION

This Article was stimulated by the need for a jurisprudential paradigm for global economic governance that goes beyond the descriptive domain of empirical positivist perspectives and beyond the instrumentalist spheres of politics and economics. To that end, this Article has shown that what is at stake is not only knowing how global economic governance originates and how it in fact operates, but also whether and on what justificatory ground global actors should respect it. As demonstrated, three competing jurisprudential paradigms are central to that discussion: positivism, pragmatism, and naturalism. Each contains strong emotive and political reverberations, and each is able to elicit passionately radical debate and counterargument. At root, the three paradigms stem from divergent philosophical traditions of thinking about the nature of law and, by extension, about the essential character of international law and global governance. The Article has shown, however, that much of the contemporary discourse on global economic governance tends to proceed from positivistic and pragmatic viewpoints that, while geared toward explaining and designing strategies according to the perceived dictates of legal, political and economic forces, or toward power and market-driven processes as they continuously exert influence in the international arena, still fail to address the legitimacy beyond the legality of that governance.

Thus, the positivistic viewpoint postures itself as purely empirical and therefore neutral and value-free, and its analysis tends to center upon thinking in *de facto* power terms. Upon such an assumption, we should support efforts to strengthen global economic governance be-

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<sup>612</sup> See John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 134, 148 (Robert P. George ed., 1992).

<sup>613</sup> See *id.*

<sup>614</sup> See *id.*

<sup>615</sup> POPE PAUL VI, ENCYCLICAL LETTER: *HUMANAE VITAE* ¶ 14 (1968) (quoting *Romans* 3:8), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).



cause we are, as a matter of brute fact, coerced into doing so. We are compelled not from some supranational command of a sovereign, and not from any force of moral law, but rather by a logic that assumes that nothing can be in everyone's interests because interests are always in conflict. According to the pragmatic viewpoint, we should fortify global economic governance because of the anticipated good political or economic outcomes that will ensue.

By contrast, the tradition of natural law sees human communities as bound together by common values, which can be derived primarily from the application of human reason. According to this interpretive framework, international order of the sort sought by global economic governance is a good that follows logically from basic human sensibilities. It is compelling because it is good, rather than being good because it is compelled under the positivistic framework or compelling under the pragmatist framework.

Making a case for a global economic governance regime for sustainability and human rights, equipped with a system of sanctions, that would serve as an overarching institution, encompassing corporations, states, NGOs, IGOs, and civil society, has not been the aim of this Article. Instead, the Article has sought to provide an alternative conceptual framework for justifying, in non-instrumental normative terms, the decentralized and fragmented soft law regimes that continue to emerge. In addition, this Article has argued that, no matter how dissimilar to traditional state-centric regimes the emerging governance regimes become, they still presuppose and derive their legitimacy from the rule of law and human rights, properly understood as regulative ideals. While informal reputational rewards and penalties play an important role as substitutes for formal state sanctions, of greater need than these is intrinsic motivation to comply with soft law norms. The cultivation of this intrinsic motivation, which extends beyond law into the arena of virtue, should be considered a common objective that economic participants should strive toward in the field of civil regulations (dealing with sustainability broadly understood) and human rights. This involves an acknowledgment of the non-coercive power of "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>616</sup> Indeed, such a

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<sup>616</sup> Stephan Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982); Stephan D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephan D. Krasner ed., 1985). The definition is consistent with Keohane and Nye's definition: "sets of

convergence can already be seen in the sense that a normative structure already is in place behind the international human rights regime that has existed for decades.<sup>617</sup> The natural law frame of reference has a unique and vital contribution to make here.

Whether addressees will embrace the normative content of the sustainability and human rights governance framework depends as much on the power of normative ideas as on the socio-political and economic conditions that are functional to the governance gaps which the soft law is positioning itself to solve.

This Article has shown that it is not a necessary feature of law that centralized sanctions exist to address the noncompliant behaviors of states and other actors in the field of business and human rights. More important than focusing exclusively on descriptive, coercive, and instrumental features of law, and seeking some overarching sanctions system that would necessitate pledging allegiance to a global super-sovereign, is cultivating awareness of the importance of non-instrumental internal dispositions of actors to respect the normative obligatory nature of norms aimed at the global common good. On the other hand, designing regimes consistent with the global trends of interconnectivity, decentralization, and dispersion of authority should be a common objective for all the actors—states, IGOs, NGOs, and business enterprises—to pursue.<sup>618</sup> A focus on dialogue within a shared intellectual framework—one that is clearly and uniquely exhibited by a naturalistic jurisprudence that accords intrinsic value to

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governing arrangements” that include “networks of rules, norms and procedures that regularize behavior and control its effects.” ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 19 (1977). The regime concept of those days was distinctly state-centered so that, as Ruggie described, “whatever roles transnational actors might play in the context of international regimes . . . were filtered through the prisms of their influence on governmental and intergovernmental policy processes.” Ruggie, *supra* note 57, at 501. Arguably, the original definition remains relevant even though in the contemporary global situation, albeit still state-based, transnational or global actors—including civil society organizations—have gained more prominence as global actors.

<sup>617</sup> Cf. Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT’L ORG. 599, 613–14 (1986) (analogizing governance regimes to markets that are created by demand).

<sup>618</sup> Some scholars argue that corporations should assume responsibilities associated with governments and international organizations. For instance, Nien-Hê Hsieh insists that corporations should have responsibility to promote well-ordered institutions in societies where they operate that are not well-ordered. Nien-Hê Hsieh, *Does Global Business Have a Responsibility to Promote Just Institutions?*, 19 BUS. ETHICS Q. 251, 267–69 (2009). See generally Alice de Jonge, *Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum*, 7 CRITICAL PERSP. ON INT’L BUS. 66 (2011) (identifying weaknesses in international legal oversight of transnational corporations).

human rights and the rule of law—is essential to the imperative project of bridging governance gaps.